In the Case of Herrera-Ulloa,

the Inter-American Court of Human Rights (hereinafter "the Court" or "the Inter-American Court"), pursuant to articles 29, 37, 56, 57 and 58 of the Rules of Procedure of the Court (hereinafter "the Rules of Court") ** and Article 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), deliver the following judgment.

** The present judgment is delivered in accordance with the Rules of Procedure that the Court approved at its XLIX regular session, by order dated November 24, 2000, which entered into force on June 1, 2001, and in accordance with the partial amendment that the Court approved at its LXI regular session, in a November 25, 2003 order that entered into force on January 1, 2004.

I. INTRODUCTION OF THE CASE

1. On January 28, 2003, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") filed an application with the Court against the State of Costa Rica (hereinafter "the State" or "Costa Rica") based on petition No. 12,367, received at the Commission's Secretariat on March 1, 2001.

2. The Commission filed the application pursuant to Article 51 of the American Convention, for the Court to decide whether the State had violated Article 13 (Freedom of Thought and Expression), in combination with the obligations set forth in articles 1(1) (Obligation to Respect Rights) and 2 (Domestic Legal Effects) of the Convention, to the detriment of Mauricio Herrera Ulloa and Fernán Vargas Rohrmoser by its criminal conviction of Mr. Herrera Ulloa on four counts of publishing insults constituting defamation of a public official. His conviction carried with it all the attendant consequences under Costa Rican law, including civil liabilities.

3. The facts submitted by the Commission concern violations alleged to have been committed by the State by virtue of the November 12, 1999 conviction. That conviction was a consequence of the fact that on May 19, 20 and 21, and December 13, 1995, the newspaper "La Nación" had carried a number of articles by journalist Mauricio Herrera Ulloa that partially reproduced several articles from the Belgian press. The Belgian press reports had attributed certain illegal acts to Félix Przedborski, Costa Rica's honorary representative to the International Atomic Energy Agency in Austria. The November 12, 1999 judgment, delivered by the Criminal Court of the First Judicial Circuit of San José, found Mr. Mauricio Herrera Ulloa guilty on four counts of publishing insults constituting defamation and ordered him to pay a fine; La Nación was ordered to publish the "Now Therefore" portion of the court's judgment. The court also upheld the claim for civil damages. It found Mr. Mauricio Herrera Ulloa and La Nación jointly and severally liable and ordered them to pay a compensation for the moral damage caused by the articles carried in La Nación, and to pay court costs and personal damages as well. The judgment also ordered La Nación to remove the link at the "La Nación Digital" website between the surname Przedborski and the impugned articles, and to create a link between those articles and the operative part of the court's judgment. Finally, the Commission pointed out that under Costa Rican law, Mr. Herrera Ulloa's conviction met that his name was entered into the Judiciary's Record of Convicted Felons. In addition to the foregoing, the Commission reported that on April 3, 2001, the Criminal Court of the First Judicial Circuit of San José issued an order demanding that Mr. Fernán Vargas Rohrmoser, legal representative of the "La Nación" newspaper, pay the penalty the court imposed on that newspaper in the November 12, 1999 judgment, warning that failure to do so might constitute the crime of contempt of authority.

4. The Commission also asked the Court to order the State to award compensation for the damages caused to the alleged victims; to nullify and eliminate all the consequences that followed from Mr. Mauricio Herrera Ulloa's conviction, and the effects the court's judgment had vis-à-vis Mr. Fernán Vargas Rohrmoser; to vacate the order to remove the link at the "La Nación" Digital website between the surname Przedborski and the impugned articles; to eliminate the link between those articles and the operative part of the court's decision to convict; to remove Mr. Herrera Ulloa's name from the Judiciary's Record of Convicted Felons; and to vacate the order to establish a link at the "La Nación" Digital website between the articles and the operative part of the judgment. The Commission also asked the Court to order the State to amend its criminal laws to comport with the provisions of the American Convention. Finally the Commission asked the Court to order the State to pay the legal costs and expenses incurred by the alleged victims.

II. COMPETENCE

5. Costa Rica has been a State Party to the American Convention since April 8, 1970, and accepted the contentious jurisdiction of the Court on July 2, 1980. Therefore, the Court is competent to hear the instant case, pursuant to Articles 62 and 63(1) of the Convention.

III. PROCEEDING BEFORE THE COMMISSION

6. On March 1, 2001, Mssrs. Fernando Lincoln Guier Esquivel and Fernán Vargas Rohrmoser, assisted by Mr. Carlos Ayala Corao, filed a petition with the Inter-American Commission and a request seeking precautionary measures. The Commission opened the case that same day, under No. 12,367.

7. On March 1, 2001, the Commission adopted precautionary measures and requested the State to stay execution of the November 12, 1999 conviction until such time as the Commission had examined the case. On March 28, 2001, the Commission submitted a request to the Court seeking provisional measures on behalf of Mssrs. Mauricio Herrera Ulloa and Fernán Vargas Rohrmoser (see Chapter IV below).

8. On March 30, 2001, the petitioners filed a brief elaborating upon the original petition.

9. On December 3, 2001, the Commission approved Admissibility Report No. 128/01, whereby it declared the case admissible.

10. On December 21, 2001, the Commission placed itself at the disposal of the parties with a view to arriving at a friendly settlement, pursuant to Article 48(f) of the American Convention.

11. On October 10, 2002, the Commission, pursuant to Article 50 of the Convention, approved Report No. 64/02 wherein it recommended to the State that it:

1. Nullify the conviction delivered against Mr. Mauricio Herrera Ulloa and the "La Nación" Newspaper, represented by Mr. Fernán Vargas Rohrmoser:
1.a. Remove Mr. Mauricio Herrera Ulloa's name from the Judiciary's Record of Convicted Felons;
1.b. Vacate the order to remove the link at the "La Nación" Digital website on the Internet that directs the reader from the surname Przedborski to the impugned articles and the operative part of the judgment;
1.c. Make reparation for the harm caused to Mr. Mauricio Herrera Ulloa by paying the corresponding compensation.
1.d. Take the measures necessary to prevent a recurrence of these events in the future.

The Commission transmitted that report to the State and gave Costa Rica two months to comply with the recommendations contained therein.

12. On October 28, 2002, the Commission forwarded the above-mentioned report to the State and gave it two months in which to comply with the recommendations.

13. On January 28, 2003, the Commission submitted the case to the jurisdiction of the Court.

IV. PROVISIONAL MEASURES

14. In accordance with Article 63(2) of the American Convention, Article 76 of the Commission's Rules of Procedure at that time, and Article 25 of the Rules of Court, on March 28, 2001 the Inter-American Commission submitted a request seeking provisional measures on behalf of Mssrs. Mauricio Herrera Ulloa and Fernán Vargas Rohrmoser. The Commission based its request on the "imminence of the impending enforcement of the civil damages ordered [...] and [the] fact that the State disregarded the Commission's own request for precautionary measures seeking a stay of execution of the judgment" which would have irreparably violated the right to freedom of expression of Mr. Herrera Ulloa and Mr. Vargas Rohrmoser and would have rendered moot any decisions that the Commission and the Court might adopt on the matter.

15. On April 6, 2001, the President of the Court (hereinafter "the President" or "the President of the Court") requested the State, "as an urgent measure, to abstain from executing any action that would alter the status quo of the matter until [the] public hearing has been held and the Court is able to deliberate and decide on the admissibility of the provisional measures requested by the Commission." [FN1]

[FN1] Cf. Case of "La Nación". Provisional Measures. Order of the Inter-American Court of Human Rights of April 6, 2001, operative paragraph 3.

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16. On May 23, 2001, the Court confirmed the President's April 6, 2001 order and requested the State to refrain from taking any action that might alter the status quo of the matter until such time as a report was presented and the Court was able to deliberate on the matter and arrive at a decision.

17. On September 7, 2001, the Court called upon the State to adopt forthwith those measures necessary to suspend the entry of Mauricio Herrera Ulloa's name in the Judiciary's Record of Convicted Felons until such time as the bodies of the inter-American system had arrived at a final decision on his case. The Court also asked the State to stay the court order for La Nación to publish the "Now Therefore" portion of the November 12, 1999 conviction handed down by the Criminal Court of the First Judicial Circuit of San José, and to stay the order to create a link at the La Nación Digital website between the impugned articles and the operative part of that court judgment. [FN2]

[FN2] Cf. Case of "La Nación". Provisional Measures. Order of the Inter-American Court of Human Rights of September 7, 2001, operative paragraphs one and two.

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18. On December 6, 2001, the Court asked the State to continue to apply the provisional measures called for in the Court's September 7, 2001 order and to continue to withhold Mauricio Herrera Ulloa's name from the Judiciary's Record of Convicted Felons. [FN3]

[FN3] Cf. Case of "La Nación". Provisional Measures. Order of the Inter-American Court of Human Rights of December 6, 2001, operative paragraph two.

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19. On July 30, 2002, the Ministry of Foreign Affairs of Costa Rica sent the Inter-American Court a letter rogatory from the Criminal Court of the First Judicial District of San José, dated June 27, 2002, in which the San José Criminal Court requests that the State ask the Inter-American Court whether the provisional measures called for in its September 7, 2001 order (supra paragraph 17) apply to the entire judgment.

20. On August 26, 2002, the Court issued an order on the provisional measures, wherein it resolved:

1. To stipulate that the provisional measures ordered refer specifically to:

a) taking, without delay, whatever steps are required to annul the entry of Mauricio Herrera Ulloa's name in the Judiciary's Record of Convicted Felons until a final decision is reached on this case by the bodies of the inter-American human rights system;

b) suspending the order to publish in the daily "La Nación" the "Now Therefore" section of the conviction decided by the Criminal Trial Court of the First Circuit of San José on November 12, 1999; and

c) suspending the order to establish a "link", in La Nación Digital, between the disputed articles and the operative paragraphs of that judgment.

2. To stipulate that the aforementioned provisional measures were decreed to attain the effects stated in the ninth Whereas of that Order, independently of the civil, criminal, or other projections of points 1), 4), and 6) of the aforementioned judgment by the Criminal Trial Court of the First Circuit in San José. [FN4]

[FN4] Cf. The "La Nación" Case. Provisional Measures. Order of the Inter-American Court of Human Rights of August 26, 2002, operative paragraphs one and two.

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21. On November 18 and 20, 2002, the Commission and the petitioners, through their intermediary, petitioned the Court in connection with the brief filed by the State on July 30, 2002 (supra para. 19) and the August 26, 2002 order (supra para. 20), to have this order rescinded so that the Commission might have an opportunity to present the observations it deemed pertinent with regard to the Costa Rican initiative.

22. On November 22, 2002, the Court decided to dismiss the Commission's request (supra para. 21) to rescind the Court's August 26, 2002 order (supra para. 20) and to keep intact the decisions made by the Inter-American Court in its earlier orders since, under Article 25(1) of its

Rules of Procedure, "it has inherent authority [as part of its jurisdictional attributes] to issue, at the request of a party or on its own motion, instructions for enforcement of the precautionary measures it orders." [FN5]

[FN5] Cf. The "La Nación" Case. Provisional Measures. Order of the Inter-American Court of Human Rights of November 22, 2002, considering six and single operative paragraph.

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23. On December 3, 2002, the Ministry of Foreign Affairs of Costa Rica sent the Inter-American Court a letter rogatory from the Criminal Court of the First Judicial Circuit of San José, dated November 28, 2002, wherein it reported that it had denied the remedy filed by Mr. Fernando Guier Esquivel to have the October 24, 2002 order for enforcement of judgment issued by that San José court vacated. The remedy was denied on the grounds that "the court [did] not have legal authority to suspend enforcement of those parts of a final judgment that the Inter-American Court did not order stayed."

24. On January 13, 2003, the Commission stated that it had no observations on the State's letter rogatory (supra para. 23) and forwarded the observations made in this regard by the representatives of the alleged victims. Those representatives had reported that "the State had complied with operative paragraphs [one, two and three] of the Inter-American Court's September 7 [2001] order." The representatives went on to say, however, that on August 27, 2002, Mr. Przedborski's attorneys had asked the Costa Rican court to enforce the November 12, 1999 judgment. Given that fact, the attorneys representing Mr. Mauricio Herrera Ulloa and "La Nación" filed a "motion of improper procedure" so that the court hearing the case would comply with the Inter-American Commission's recommendation. The court never ruled on the motion.

25. On March 10, 2003, the Ministry of Foreign Affairs of Costa Rica forwarded to the Court a letter rogatory from the Criminal Trial Court of the First Judicial Circuit of San José, dated March 6, 2003, in which it reported that it had denied the improper procedure motion filed by Mr. Fernando Guier Esquivel to have that San José court's October 24, 2002 order for enforcement of judgment vacated. The motion was denied on the grounds that it was not a procedural means to challenge decisions such as the one being appealed.

26. The application that the Inter-American Commission filed with the Court in the present case concerns the facts that prompted this Court to order provisional measures on behalf of Mr. Mauricio Herrera Ulloa. Given the nature of this matter, the Court finds that the corresponding analysis should be set aside until the decision on the merits of the case presented.

V. PROCEEDING BEFORE THE COURT

27. The Commission filed the application with the Court on January 28, 2003 (supra para. 1).

28. In keeping with articles 22 and 33 of the Rules of Court, the Commission designated Mr. Robert Goldman and Mr. Santiago A. Canton as delegates in this case, and Ariel Dulitzky, Martha Braga, Débora Benchoam and Norma Colledani as advisors. As prescribed by Article 33

of the Rules of Court, the Commission reported the names of the original petitioners and gave a single address for them.

29. Once the President of the Court had made a preliminary review of the application, on February 14, 2003 the Secretariat of the Court (hereinafter "the Secretariat") notified the respondent State of the application and its annexes, advised it of the deadlines for answering the application, and that it was to appoint its agents in the case. That same day, by instruction of the President and in keeping with Article 18 of the Rules of Court and Article 10(3) of the Statute of the Court, the Secretariat advised the State of its right to appoint a Judge ad hoc to participate in the deliberations on the present case. That same day, February 14, 2003, in accordance with Article 35(1)e) of the Rules of Court, the alleged victims –Mssrs. Mauricio Herrera Ulloa and Fernán Vargas Rohrmoser- were also notified of the application. On February 17, 2003, pursuant to Article 35(1)(d) and e) and then Article 35(4) of the Rules of Court, [FN6] the representatives of the alleged victims, Mssrs. Carlos Ayala Corao, Pedro Nikken and Fernando Guier, were notified of the application, so that within 30 days' time, they might submit to the Court their pleadings, motions and evidence.

[FN6] Rules of Procedure approved by the Inter-American Court of Human Rights at its XLIX regular session, by a November 24, 2000 order. These Rules took effect on June 1, 2001. This article, among others, was amended by the Court at its LXI regular session, through a November 25, 2003 order. The amendment entered into force on January 1, 2004.

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30. After having been granted an extension, on March 24, 2003 Costa Rica designated Mr. Marco Antonio Mata Coto as Judge ad hoc and provided a copy of his curriculum.

31. On March 24, 2003, the State presented a note wherein it advised the Court that it had designated Mr. Farid Beirute Brenes, Attorney General of the Republic, as agent in the case, and Criminal Prosecutor José Enrique Castro Marín as alternate agent.

32. On March 31, 2003, after having been granted a two-week extension, the representatives of the alleged victims filed the brief containing their pleadings, motions and evidence. In that brief, they requested that the Court take urgent action to exercise its precautionary authority.

33. After having been granted an extension, Costa Rica filed a brief and annexes on May 20, 2003. In its brief, it raised preliminary objections, answered the application and sent its observations to the brief of pleadings, motions and evidence filed by the alleged victims' representatives.

34. On May 27 and 28, 2003, the Secretariat sent a copy of the brief to the representatives and to the Commission, respectively, so that pursuant to Article 36(4) of the then Rules of Court they might, within thirty days, present their written briefs responding to the preliminary objections raised by the State.

35. Having been given one extension, on July 23, 2003 the Commission filed its written pleadings on the preliminary objections raised by the State, but the brief received was not complete. On July 24, 2003, the Commission presented the full brief.

36. Having been given an extension, the alleged victims' representatives filed their written brief on the preliminary objections on July 23, 2003.

37. On February 18, 2004 the President of the Court summoned the Commission, the State and the alleged victims' representatives to a public hearing at the seat of the Inter-American Court, starting April 30, 2004, at 9:00 a.m. The hearing was held to hear the witnesses, expert witnesses, and final oral arguments on the preliminary objections and on possible merits, reparations and costs. In that summons, the President set May 31, 2004, as the deadline for the parties to present their final written pleadings on the preliminary objections and possible merits, reparations and costs. The President also requested that Mrs. Laura Mariela González Picado's testimony and Mr. Julio Maier's expert testimony be given through affidavits sworn in the presence of a public civil servant. Those affidavits were to be sent to the Court by no later than March 11, 2004.

38. On February 19, 2004, the Committee to Protect Journalists, the Hearst Corporation, the Miami Herald Publishing Company, El Nuevo Día, La Prensa, the Reform Group, Reuters Ltd., El Tiempo and the Tribune Company filed an amicus curiae brief.

39. On February 23, 2004, the Asociación para la Defensa del Periodismo Independiente (PERIODISTAS) filed an amicus curiae brief.

40. The Inter-American Press Association presented an amicus curiae brief on March 10, 2004.

41. The Colegio de Periodistas de Costa Rica submitted an amicus curiae brief on March 11, 2004.

42. On March 11, 2004, the Inter-American Commission sent the testimony of Mrs. Laura Mariela González Picado, given in an affidavit sworn in the presence of a public civil servant (supra para. 37).

43. On March 16, 2004, the Secretariat sent the State and the alleged victims' representatives the statement that Mrs. Laura Mariela González Picado made in the presence of a public civil servant, so that they might present whatever observations they deemed pertinent.

44. On March 30, 2004, the alleged victims' representatives advised the Court that they were withdrawing their offer of Mr. Julio Maier as an expert witness, as he was unable to provide an expert report in the form of an affidavit.

45. On March 30, 2004, Article 19, Global Campaign For Free Expression, filed an amicus curiae brief.

46. Because Mr. Julio Maier was unable to give his expert report in the form of an affidavit given before a public civil servant, on April 7, 2004 the alleged victims' representatives petitioned the Court to permit Mr. Carlos Tiffer Sotomayor, whom the Inter-American Commission on Human Rights had offered as an expert witness, to expand his report to address as well the subject matter about which the expert originally proposed by the alleged victims' representatives, Mr. Julio Maier, was to have testified.

47. On April 19, 2004, the Center for Justice and International Law (CEJIL) presented an amicus curiae brief.

48. On April 22, 2004, the President of the Court issued an order wherein he broadened the content of the opinion to be given by Mr. Carlos Tiffer Sotomayor, the expert offered jointly by the Inter-American Commission and the alleged victims' representatives to appear in a public hearing before the Court.

49. On April 26, 2004, the World Press Freedom Committee filed an amicus curiae brief.

50. On April 30 and May 1, 2004, the Court held a public hearing where it received the testimony of the witnesses and expert witnesses offered by the Inter-American Commission, by the alleged victims' representatives and by the State on the preliminary objections and possible merits, reparations and costs. It also heard the parties' final oral arguments.

There appeared:

for the Inter-American Commission on Human Rights:

Evelio Fernández, delegate;
Santiago A. Canton, delegate;
Lilly Ching, advisor;
Marisol Blanchard, advisor,
Martha Braga, advisor, and

for the alleged victims:

Pedro Nikken, representative;
Carlos Ayala Corao, representative;
Fernando Guier, representative, and

for the Costa Rican State:

Farid Beirute Brenes, agent;
José Enrique Castro Marín, alternate agent, and
Tatiana Gutiérrez Delgado, advisor;

witnesses offered by the Inter-American Commission:

Mauricio Herrera Ulloa, and

Fernán Vargas Rohrmoser;

expert witness offered by the Inter-American Commission:

Rubén Hernández Valle;

expert witness offered jointly by the Inter-American Commission and the alleged victims' representatives:

Carlos Tiffer Sotomayor;

expert witness offered by the alleged victims' representatives:

Héctor Faúndez Ledesma;

expert witnesses offered by the Costa Rican State:

Federico Sosto López, and
Luis Alberto Sáenz Zumbado.

51. Expert witness Rubén Hernández Valle and witnesses Mauricio Herrera Ulloa and Fernán Vargas Rohrmoser introduced a number of documents on the occasion of the public hearing on preliminary objections and possible merits, reparations and costs, held on April 30 and May 1, 2004.

52. On May 7, 2004, the Open Society Justice Initiative filed an amicus curiae brief.

53. On May 27 and 31 and June 2, 2004, the State, the alleged victims' representatives and the Inter-American Commission, respectively, submitted their final written pleadings. The alleged victims' representatives attached a number of annexes to their brief.

VI. THE EVIDENCE

54. Before embarking upon its examination of the evidence received, the Court will analyze, in light of the provisions of articles 44 and 45 of the Rules of Court, certain considerations that are applicable to the specific case, most of which have been addressed in the Court's own case law.

55. To begin with, the principle of the presence of both parties to an action, which establishes respect for the parties' right to defense, is applicable in evidentiary matters. This principle is one of the underpinnings of Article 44 of the Rules of Procedure, which provides that the evidence must be received in a proceeding with both parties present, to ensure equality between them. [FN7]

[FN7] Cf. Case of Maritza Urrutia. Judgment of November 27, 2003. Series C No. 103, para. 46; Case of Myrna Mack-Chang. Judgment of November 25, 2003. Series C No. 101, para. 118; and Case of Bulacio. Judgment of September 18, 2003. Series C No. 100, para. 40.

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56. In keeping with the Court's customary practice, at the start of each procedural stage the parties must state, at the first opportunity granted them to do so in writing, what evidence they will offer. The Court, exercising its discretionary authority under Article 45 of its Rules of Procedure, may ask the parties to supply additional probatory elements, as evidence to facilitate adjudication of the case, without this constituting a new opportunity for the parties to expand upon or make additions to their pleadings or to offer new evidence, unless the Court so allows. [FN8]

[FN8] Cf. Case of Maritza Urrutia, supra note 7, para. 47; Myrna Mack Chang Case, supra note 7, para. 119; and Bulacio Case, supra note 7, para. 41.

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57. On the matter of receiving and assessing evidence, the Court has previously held that proceedings before this Court are not subject to the same formalities required in domestic judicial proceedings and that admission of items into evidence must be done paying special heed to the circumstances of the specific case and bearing in mind the limits set by respect for legal certainty and procedural balance between the parties. [FN9] The Court has also taken account of the fact that international case law holds that international courts have the authority to appraise and assess evidence based on the rules of competent analysis, and has thus always avoided rigidly determining the quantum of evidence necessary as the basis for a ruling. [FN10] This criterion is especially valid with respect to international human rights courts, which –to establish the international responsibility of a State for violation of an individual's rights- have ample flexibility for assessment of the evidence submitted to them regarding the pertinent facts, in accordance with the rules of logic and based on experience. [FN11]

[FN9] Cf. Case of Maritza Urrutia, supra note 7, para. 48; Myrna Mack Chang Case, supra note 7, para. 120; and Bulacio Case, supra note 7, para. 42.
[FN10] Cf. Case of Maritza Urrutia, supra note 7, para. 48; Myrna Mack Chang Case, supra note 7, para. 120; and Bulacio Case, supra note 7, para. 42.
[FN11] Cf. Case of Maritza Urrutia, supra note 7, para. 48; Myrna Mack Chang Case, supra note 7, para. 120; and Bulacio Case, supra note 7, para. 42.

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58. Based on the above, the Court will now examine and assess the set of items that constitute the body of evidence in the instant case, following the rules governing reasoned judgment arrived at freely and on the basis of admissible evidence, within the relevant legal framework.

A) DOCUMENTARY EVIDENCE

59. As the provisional measures were being processed, the Inter-American Commission, the alleged victims' representatives and the State submitted various documents. [FN12]

[FN12] Cf. Volume of annexes accompanying the Inter-American Commission's request for provisional measures; volume of documents supplied by the Inter-American Commission on Human Rights and the State during the public hearing held on May 22, 2001, in connection with the request for provisional measures; and folios 94 to 126 and 207 to 351 of Volume I of the file on provisional measures in the Case of "La Nación" newspaper; and folios 377 to 404, 4421 to 423, 469, 477 and 626 to 632 of volume II of the file on provisional measures in the "La Nación" Case.

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60. The parties supplied documentary evidence in the form of the application, the briefs containing their pleadings, motions and evidence, the brief of preliminary objections, the answer to the application and the observations on the brief of pleadings, motions and evidence (supra paragraphs 27, 32 and 33). [FN13]

[FN13] Cf. File of annexes to the application filed by the Inter-American Commission on Human Rights, volumes I, II and III, annexes 1 to 22, folios 537 to 1682; annexes F) to M) of the March 31, 2003 brief of pleadings, motions and evidence from the alleged victims' representatives (record on preliminary objections and possible merits, reparations and costs, volume I, folios 340 to 405); annex to the brief submitted by the alleged victims' representatives on May 20, 2003 (file on preliminary objections and possible merits, reparations and costs, volume II, folios 746 to 759); annexes 1 to 2 of the brief filed by the State in answer to the application of May 20, 2003, (file on preliminary objections and possible merits, reparations and costs, Volume II, folios 599 to 741).

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61. On March 11, 2004, the Inter-American Commission forwarded the sworn affidavit that Mrs. Laura Mariela González Picado (supra para. 42) gave in the presence of a public civil servant. [FN14] The Court summarizes the pertinent parts of that affidavit below.

[FN14] Cf. folios 1107 to 1109 of Volume III of the file on preliminary objections and possible merits, reparations and costs.

Testimony of Laura Mariela González Picado, wife of alleged victim Mauricio Herrera Ulloa.

Laura Mariela González Picado has been married to Mauricio Herrera Ulloa since 1995. "From the time [they] were engaged and newlyweds, [her] husband was very tense and depressed [,…] as he had been threatened with criminal indictment for articles he published about scandals involving a Costa Rican diplomat accredited to a number of countries and an international

agency headquartered in Europe." Her husband was a journalist at the time, covering the Ministry of Foreign Affairs of Costa Rica and the country's diplomatic service. In January 1996, the diplomat in question brought two complaints, "which made [her] husband even more tense." The first trial on the two complaints came three years later. Her husband was "acquitted of any blame. However, the diplomat filed a writ of cassation […] with the Third Chamber of the Supreme Court of Justice, which reversed the acquittal one year later, in May 1999. The case went back to trial in November of that year." Her husband "spent more than a month going to court every day, from morning till late afternoon." This drove him to take medications to calm his nerves and even to seek psychological help. He asked that she and the children move in with her mother, while he stayed alone in the family home. Her husband was unable to see anyone and unable to live a normal, tranquil life. In November 1999, Mauricio Herrera Ulloa was convicted of criminal defamation, and the writs of cassation that his attorneys filed were denied by the very same Third Chamber of the Supreme Court in January 2001. It was then that her husband turned to the Inter-American Commission to begin proceedings.
When her husband was ultimately convicted of criminal defamation, "he was miserable and said over and over again, almost obsessively, that he was finished as a journalist because he [had] been convicted of criminal defamation and [was] registered as a convicted felon in the Judiciary's Record of Convicted Felons. No reader would ever believe his stories, thinking instead that he was nothing but a liar casting aspersions on other people's good name or reputation; so his career in journalism was over." However, following the conviction the newspaper gave her husband a number of assignments and investigations. He completed them, but then "was afraid to publish his articles, fearing another trial; while writing his pieces, he was always wondering what the criminal court judges would think [about the content of the articles]. He was paralyzed by fear during this period."
As a consequence of all these legal proceedings, Mrs. González Picado and her husband Mauricio Herrera Ulloa had to sell the family home and move elsewhere, where he was not thought of as "the one who lost the trial and was convicted of criminal defamation."

62. The expert Rubén Hernández Valle presented his expert report in writing, during the expert testimony given in the hearing on preliminary objections and possible merits, reparations and costs (supra para. 50). [FN15]

[FN15] Cf. folios 3450 to 3461 of the single volume of evidence presented during the public hearing held on April 30 and May 1, 2004.

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63. Mr. Mauricio Herrera Ulloa presented documents during his testimony at the public hearing on preliminary objections and possible merits, reparations and costs (supra para. 50). [FN16]

[FN16] Cf. folios 3468 to 3671 of the single volume of evidence presented during the public hearing held on April 30 and May 1, 2004.

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64. Mr. Fernán Vargas Rohrmoser also introduced documentation during his testimony at the public hearing on preliminary objections and possible merits, reparations and costs (supra para. 50). [FN17]

[FN17] Cf. folios 3449 and 3466 to 3467 of the single volume of evidence presented during the public hearing held on April 30 and May 1, 2004.

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65. When they submitted their final written pleadings on May 31, 2004 (supra para. 53), the alleged victims' representatives attached a number of documents as evidence. [FN18]

[FN18] Cf. annexes 1 to 6 of the brief of final written pleadings presented by the alleged victims' representatives and dated May 31, 2004 (file on preliminary objections and possible merits, reparations and costs, volume V, folios 1614 to 1645).

B) TESTIMONIAL AND EXPERT EVIDENCE

66. At the public hearing held on April 30 and May 1, 2004, the Court heard the testimony of the witnesses and the opinions of the expert witnesses offered by the Inter-American Commission on Human Rights, the alleged victims' representatives and the State, respectively. The Court will now summarize the relevant parts of their testimony.

a. Testimony of Mauricio Herrera Ulloa, alleged victim in the case

Mauricio Herrera Ulloa has worked as a journalist at the newspaper "La Nación" for twelve years. There he has been an editor of supplements, a journalist in the political affairs department, and currently works in the Research Unit.

On May 19, 20 and 21 and December 13, 14, 15 and 16, 1995, he published seven articles in "La Nación, which made reference to reports published in four first-rate, prestigious newspapers in Belgium. The reports in concerned Mr. Félix Przedborski, who at the time was Costa Rica's Ambassador to the International Atomic Energy Agency. Mr. Herrera Ulloa was at the time working in the political section of the "La Nación" newspaper and was assigned to cover the Ministry of Foreign Affairs and the presidential residence. The news reported in the Belgian press implicated Mr. Przedborski in the "biggest financial, political and military scandal in the history" of that country. The Belgian newspapers linked Mr. Przedborski with "shady, under-the-table deals" in which he allegedly received commissions from the sale of combat helicopters, a sale that set in motion a chain of events that eventually led to the assassination of Belgium's Vice Prime Minister, André Cools. Mr. Przedborski's name came up in the midst of the investigation into the matter in Belgium which allegedly implicated him in a "multi-million dollar fiscal mess in Germany and Belgium" and various kinds of "illegal trafficking."

The newspaper "La Nación" and Mr. Herrera Ulloa thought it was entirely legitimate to inform the Costa Rican public of the reports about Mr. Przedborski in the European press, since "freedom of information is a two-way street": on the one hand, every citizen has the right to

seek, investigate and impart information on matters of public interest; on the other hand, every citizen also has a right to receive that information. Mr. Herrera Ulloa exercised that two-way right in the articles he published in "La Nación."

Mr. Mauricio Herrera Ulloa and the newspaper "La Nación" regarded the contents of the articles published in a number of foreign newspapers as meeting a public interest; before publishing the articles, they checked the reliability of the sources and reviewed their facts. This process, which is routine for any case being reported by "La Nación", initially consisted of "the most thorough verification possible" of the sources available to them. They checked documents and, to confirm the facts and turn up new information, consulted a number of people who may have had some contact with the story. The newspaper had a system whereby the progress on a story was discussed with immediate superiors. Mauricio Herrera Ulloa prepared notes for those immediate superiors; once they were clear about where the notes were leading them, a further review process kicked in, first by the immediate superior, then by the editor, and finally by an attorney.

Throughout this process, Mr. Mauricio Herrera Ulloa and the newspaper "La Nación" made "exhaustive attempts" to locate Mr. Przedborski. He could not be found, however.

When the first story appeared in the newspaper, a person identifying himself as Mr. Felix Przedborski's attorney appeared. Mr. Herrera Ulloa availed himself of the opportunity to try to get Mr. Przedborski's side of the story on the matter, but was unable. The witness even communicated with Mr. Ricardo Castro, Mr. Przedborski's attorney, and sent him a list of questions in writing. Mr. Castro answered by letter, stating his refusal to respond to the articles in question.

Unable to speak with Mr. Félix Przedborski directly, Mr. Herrera Ulloa turned to sources at the Ministry of Foreign Affairs. He spoke with the then Foreign Minister and Deputy Foreign Minister of Costa Rica, whose versions were consistent with the accusations being made against Mr. Przedborski. However, the Foreign Minister and Deputy Foreign Minister stated that thus far, no one had come up with reliable evidence of the charges. He also interviewed Costa Rican diplomats and former diplomats. They all "rigorously" confirmed the existence of the publications and of the charges against Mr. Przedborski. The Ambassador of Costa Rica in Belgium sent the Foreign Office an official report, containing a translation of the articles in the Belgium press. That document made it very clear that Costa Rican diplomatic circles were very troubled by the repeated appearances of Mr. Przedborski's name in the Belgian press.

Although he had never had any contact with Mr. Przedborski, Mr. Herrera Ulloa did include in his stories the favorable comments that former Costa Rican presidents Luis Alberto Monge and Rafael Ángel Calderón had made about the Costa Rican diplomat, and also added "verbatim" the information supplied by Mr. Ricardo Castro, Mr. Przedborski's, to counter the charges. Mr. Herrera Ulloa also "contextualized" the reports with background information on Mr. Przedborski that was in the public domain, inasmuch as the charges being made in the Belgian press were not isolated. Mr. Herrera Ulloa even toned down the information reported in Europe about Mr. Przedborski. But he never came across any information that would disprove the information reported in the Belgian newspapers; quite the contrary, the information he had in his possession confirmed the truthfulness of those arties. Had he believed that the articles he published were untrue, then he would have issued a retraction. He did not because he was convinced that "the facts he reported were true."

As a consequence of the second series of articles that appeared in "La Nación" on December 13, 14, 15 and 16, 1995, he learned that Mr. Félix Przedborski had filed suit against the smallest of the four Belgian newspapers. In the end, the Belgian journalist, the author of the impugned

article in that country, “was forced to issue a retraction” to avoid criminal punishment. The common feature of the four articles being challenged in the Costa Rican courts –three from the first series and one from the second series- was that they all made reference to the Belgian newspapers, whereas the articles not challenged in court did not. These articles were “completely separate investigative reporting in Costa Rica,” and hence reproduced nothing of what was being reported in Belgium.

Mr. Herrera Ulloa’s articles appeared in the midst of a national dialogue on Costa Rica’s foreign service, brought on by a number of scandals involving other Costa Rican honorary diplomats. The situation was so disturbing that even the Ministry of Foreign Affairs organized a special fact-finding group to look into what was happening in the foreign service. As a result of that investigation, a number of honorary diplomats had their appointments revoked.

As a consequence of the articles he published, Mr. Herrera Ulloa was named in two criminal complaints and had to “suffer” eight years of proceedings in the Costa Rican courts. He had to endure an inquisitorial proceeding in which the judges acquitted him on the grounds that his reporting was truthful and he had acted responsibly and diligently. But Mr. Przedborski appealed this judgment with the Third Chamber of the Supreme Court of Costa Rica, which vacated the acquittal and ordered that the case be retried by a new bench. In that second trial, which lasted a month and a half, Mr. Herrera Ulloa was subjected to “16 hours of questioning” by the judges and was found guilty on the grounds that he had acted with malicious intent. Mr. Herrera Ulloa appealed his conviction, but the appeal was denied by the Third Chamber of the Costa Rican Supreme Court. The justices who reviewed the appeal of the conviction were the very same justices who had nullified the verdict of acquittal, and had thus already formed an opinion on the case. They upheld the conviction and Mr. Herrera Ulloa’s name was entered into the Judiciary’s Record of Convicted Felons, available to local governments, the police, rural constabularies and gendarmerie, the General Bureau of Migration, etc. While the listing of his name in the Judiciary’s Record of Convicted Felons was widely reported and publicized, not so his “delisting.”

The criminal proceedings and the listing of his name in the Judiciary’s Record of Convicted Felons caused the witness grievous harm professionally and left him with an unrelenting sense of insecurity and dread about the consequences and results that the process as a whole would have for himself personally, his career and his family. All this took a “tremendous, terrible, devastating” toll on his practice of journalism, not just the conviction but the entire process itself that depicted and treated him as a criminal. For a journalist “the trial itself is a punishment; it is a public discrediting of one’s adherence” to professional standards. Since his conviction, he has been profoundly disgraced, so much so that every time he does an interview with a public figure who is associated with any kind of controversy, he always hears the refrain, “Oh, you’re the convicted journalist.” He often hears warnings like “Careful, you could wind up in court again.” For Mauricio Herrera Ulloa, all this is like walking around with a brand on his forehead reading ‘convicted or libelous journalist’.” Career-wise, the criminal proceedings have forced Mr. Herrera Ulloa to turn down job offers outside Costa Rica and to interrupt his studies. He has also been forced to temporarily stop working at “La Nación”.

The self-censorship has been one of the most pernicious and immediate effects of the conviction. The alleged victim has held back from publishing articles whose facts he had confirmed to be true; that hesitation is caused by a fear of having to face another criminal action.

Mr. Herrera Ulloa hopes that the Court “will nullify the judgment that convicted him” in the criminal and civil actions. He hopes “nothing like this ever happens again” and that neither he

nor any colleague ever has to endure this kind of "constant self-censorship." The alleged victim believes no Costa Rican citizen should ever be treated "like a criminal" for airing matters of public interest, as happened in this case. He also hopes that Costa Rica will "decriminalize the so-called crimes against honor" so that no one else - journalist or otherwise- who, for the sake of a legitimate interest, denounces a public official and is branded a criminal for it. Anyone who is prosecuted must also be able to expect a reliable second instance, not what happened in his case where he was never given the opportunity to file an appeal with a court of second instance, to refute "the lies in the judment [,] in a cassation proceeding." The magistrates who review a case must "not have preconceived ideas, biases, [or] opinions on that case."
No restrictions should be imposed on the information that newspapers publish on the internet in connection with reports that appear in the print version of the paper.
Furthermore, the alleged victim would have no way of paying the sixty-million colones in civil damages; the three million eight hundred ten thousand colones in personal damages and costs that he and the newspaper "La Nación," having been found jointly and severally liable, were ordered to pay; or the fine of three hundred thousand colones that he was personally ordered to pay.
From a personal standpoint, although the harm he has suffered is irreparable, he believes that the Costa Rican State owes him and his family, who have suffered through this process with him, fair compensation. Finally, journalist Herrera Ulloa requested that the "Costa Rican State acknowledge the injustice done to him and the error it has made." All he is seeking is "justice […], simply that."

b. Testimony of Fernán Vargas Rohrmoser, alleged victim in the case

Fernán Vargas Rohrmoser is an attorney and notary public. At the time of the events in this case, he was Chairman of the Board of Directors of the newspaper "La Nación" and was responsible for overseeing its corporate interests. He is currently Vice Chairman of the Board of Directors.
In the present case, the judgment that sentenced the newspaper "La Nación" and Mr. Mauricio Herrera Ulloa to pay moral damages has adverse consequences for the paper as a business. A court ruling of that nature "naturally affects the newspaper's credibility, forces the Board of Directors […] to stress the established procedures […] the editing of the newspaper to avoid […] a guilty verdict." All this lessens the independence of the newspaper's director, who has to constantly remind himself of "the danger that threatens a newspaper when legal charges are filed against it." All this affects the ability of the editor of the newspaper to impart information; it also hurts the reputation of the business.
As legal representative of "La Nación," the alleged victim believes that the court judgment against the newspaper was prejudicial to its ability to impart information.
As a member of the Board of Directors, the decision as to whether or not to publish a given article is not Mr. Rohrmoser's immediate responsibility. Board members do not have a role in that process. All the same, they consider themselves answerable to the owners of the business for the "exaggerated amounts […] that they have been ordered to pay as a result of court judgments" that find the newspaper at fault. All this affects the business' finances. The newspaper has "sixty million colones" on deposit with the Court seized of the matter.
In the instant case, the established procedures for editing articles published in "La Nación" were "scrupulously" followed. Those procedures basically strive to "strike a careful balance so that every article airs the views of the person or persons affected or [of] the actors in the matter being

reported in the newspaper; standards of journalistic style are followed, [featuring] full verification of the facts and use of proper language in telling the story." These procedures begin with the journalist himself or the person writing the article, the head of his section or editor. Then, as the facts begin to gel, the story moves up the chain of command until it reaches the legal advisor, whose job is to make certain that "all matters that might touch upon the law are being carefully observed." Other players in this process include the news chiefs, the editorial chief and the director of the newspaper.

The judgment in question required the witness to make payment in the name of the newspaper "La Nación" or face charges and "serve time in prison if the ordered damages are not paid." All this has left him fearful that he might be prosecuted at any time and "afraid of the negative effects all this could have on his career." That anxiety and fear still persist, as the court ruling that ordered him to comply or to "be prosecuted for contempt" has not been set aside.

The witness is turning to the Court both as an individual and as the representative of "La Nación" newspaper, and hopes that "the judgment will be nullified, as otherwise it will have a profound impact on democracy in Costa Rica."

c. Expert testimony of Rubén Hernández Valle, attorney

Legally speaking, the law cannot require that everything that is published be true. As Spain's Constitutional Court has held, "were truth to be prerequisite for the right [to free speech], then silence would be the only guarantee of legal certainty." Spain's Constitutional Court has developed the theory of neutral reporting, which applies "in those cases in which a communications medium is simply reporting statements made by third parties that violate the law […] honor, personal and family privacy and one's good name." For Spain's Constitutional Court, the consequence of the theory of neutral reporting is that the duty of diligent reporting is served when the existence of the fact or the statement is corroborated. In principle, however, diligence in reporting does not extend to confirming the truthfulness of the statement, as truthfulness could only be required of the person who made the statement. Thus, the veracity required in the information reported refers to a subjective rather than objective truth; in other words, it refers to fulfillment of the "minimum required to check the information" by demonstrating that a journalist's conduct was driven mainly be a desire to report a matter of public interest and that he has been reasonably diligent about getting to the truth. A distinction must be made between erroneous information and false information. The latter carries with it criminal and civil liability. Erroneous information "only generates civil liability when it can be shown that the person or thing imparting the information has not practiced diligence, care or caution to avoid inflicting harm, and has not acted in good faith." This is where the principle of "actual malice" developed by the United States Supreme Court comes into play.

Article 152 of Costa Rica's Criminal Code is incompatible with the first paragraph of Article 13 of the American Convention, inasmuch as it restricts freedom of information by imposing a criminal punishment upon a journalist for reporting defamatory speech originally made by a third party, even though the journalist has acted diligently, with strict adherence to the truth, and has made the necessary inquiries as to the reliability of the source. This violation is an illegitimate restriction of the freedom to seek, receive and impart information and ideas of all kinds" that is every journalist's right in a democratic society.

Article 149 of the Criminal Code also violates the first subparagraph of Article 13 of the Convention, because it forces a kind of self-censorship upon journalists fearful of criminal

prosecution. It also violates the right that every society has to be duly informed of everything when the information has to do with matters of public interest or involves a public official.

The criminal punishment established in Article 152 of the Costa Rican Criminal Code for cases where the exceptions to proof of truth apply as provided in Article 149 of that Code, is an unlawful restriction on journalists' freedom of expression, is incompatible with the needs of a democratic society, and does not respond to a pressing social need. The Costa Rican provisions on "defamation, insults, and calumny […] stifle criticism of public officials and have the effect of censoring the publication of articles about alleged illegal activities" by public officials. The Costa Rican criminal law is therefore incompatible with Article 13 of the American Convention.

In Costa Rica, a journalist who reports news whose source can be traced to other foreign media outlets and that contains alleged defamatory statements against a Costa Rican public official must prove that the statements or facts reported by the foreign press are true; also, there can be no evidence of malice on that journalist's part.

The possibility of establishing modern laws on freedom of the press is under discussion in Costa Rica; recently, the committee studying various bills on this subject submitted its opinion, which would substantially overhaul the laws currently on the books.

To challenge the compatibility of articles 146, 149 and 152 of the Costa Rican Criminal Code with Article 13 of the American Convention, an independent constitutional-law proceeding exists called acción de inconstitucionalidad. But in the case of a definitive ruling delivered by the Third Chamber of the Costa Rican Supreme Court upholding a conviction, the acción de inconstitucionalidad cannot be used to challenge the law applied in the judgment delivered in the instant case, because in Costa Rica such actions are not permissible against specific court rulings. In Costa Rica, one can only challenge jurisprudence, which must consist of at least three similar cases.

The right to privacy trumps freedom of information. However, the only circumstance when the right to privacy cannot be invoked to restrict freedom of information is when a public figure is involved and the public deeds of that public figure are at issue. Public officials are subject to public scrutiny and must show a greater degree of tolerance to criticism. In practice this means that the protection that public officials enjoy as regards privacy and reputation is not the same as the protection that a private citizen enjoys, as the citizenry must have complete and effective control over the manner in which public affairs are being conducted.

There are two remedies to exact satisfaction for or put an end to defamation: the right to demand correction and the right of response provided for in the Convention; the other is civil suits to demand compensation for any offense. These means are sufficient to protect a public official's honor.

Under Article 48 of Costa Rica's Constitution, human rights treaties have the same rank in law as the Constitution. Further, the Constitutional Chamber has held that if a provision of an international human rights convention better protects some fundamental right, that convention shall be applied in preference to the Constitution. The judgments that the Inter-American Court delivers are to be executed immediately within Costa Rica's juridical system, through the Constitutional Chamber; its decisions trump any decision by a domestic court.

d. Expert testimony of Héctor Faúndez Ledesma, attorney

The European Court has held that freedom of expression protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed, and that there is

little scope under Article 10 of the European Convention for restrictions on political speech or on debate on matters of public interest.

Article 4 of the Inter-American Democratic Charter provides that freedom of expression and of the press are essential components of the exercise of democracy. This same principle is reflected in some of the earliest judgments of the United States Supreme Court. Lest there be any doubt or discrepancy as to the limits, content and scope of freedom of expression, those rulings hold that it is clear that it was conceived and designed to protect political expression, messages having a political content and those having to do with the free flow of ideas on matters of public interest or concern.

Spain's Constitutional Court has held that freedom of expression serves a constitutional purpose in a system of checks, balances and counterbalances, where freedom of expression acts as a watchdog of democracy. The constitutional function that Spain's Constitutional Court attributes to free speech had been suggested in earlier judgments of the United States Supreme Court.

Regarding the "insult" or "defamation" laws in Costa Rica, Articles 146, 149 and 152 of the Costa Rican Criminal Code are not compatible with Article 13 of the American Convention. These provisions inhibit and restrict political discourse on matters of public interest or concern, in that they make no distinction vis-à-vis the targets of the insult, i.e., public officials versus private citizens, and do not discriminate for the type of issues being discussed.

Article 149 of the Costa Rican Criminal Code is incompatible with the American Convention and unsuited to the demands of a democratic society, particularly inasmuch as it places the burden of proof on a defendant accused of defamation, and then only when the proof of truth meets certain tests. If the defendant is being required to show that he did not act with malice or that what he has said is true, the burden of proof is inverted, which is contrary to the principles governing the exercise of free speech and the principle of presumed innocence.

While it is true that the provisions of articles 146 and 152 are consistent with the restrictions on free speech allowed under Article 13(2) of the American Convention, the essence of those provisions is not compatible with the Convention to the extent that they inhibit frank and open political debate, make it impossible to criticize government officials, and make no distinction for situations in which matters of public interest or concern are being discussed.

As the European Court of Human Rights has ruled time and time again, and as the Inter-American Commission stated in its Report on the Compatibility of Desacato Laws with the American Convention on Human Rights, with freedom of expression, in cases involving crimes against honor, it is the plaintiff who bears the burden of proof, not the defendant. Requiring the defendant to bear the burden of proof in such cases would be a violation of Article 13 and Article 8 of the Convention, particularly the principle of presumption of innocence.

The November 12, 1999 judgment against Mauricio Herrera Ulloa and "La Nación" is completely contrary to the freedom of expression guaranteed in Article 13 of the Convention, since judgments of this kind can certainly have a chilling effect on political discourse. The European Court of Human Rights has held that journalists' freedom also covers possible recourse to "a degree of exaggeration or even provocation."

Article 13(2) of the American Convention provides for subsequent imposition of liability. But both the doctrine and the case law make it clear that in a democratic society, such liabilities must be those strictly necessary and proportionate to the harm caused; if those conditions are not present, any such liabilities are incompatible with the Convention.

The right to appeal a ruling before a new higher court under international human rights law implies various elements. First, in its general comment Number 13, the United Nations Human

Rights Committee observed that in appeals before review tribunals, care must be taken to watch the way in which the procedures before review tribunals take account of the fair and public hearing requirements of paragraph 1 of Article 14 of the International Covenant on Civil and Political Rights. Second, the right provided for in Article 8(2)(h) of the American Convention also implies a determination as to what the court of second instance will review or examine, as there must be a full review of the law and of the facts.
The writ of cassation is not an appeal to a higher court in the sense of Article 8 of the Convention. This was also the finding of the Court in the Castillo Petruzzi et al. Case as regards the conditions and requirements that a court of second instance must meet to be deemed a fair, impartial and independent tribunal previously established by law.

e. Expert opinion of Carlos Tiffer Sotomayor, attorney

Articles 146, 149 and 152 of the Costa Rican Criminal Code are not compatible with the American Convention inasmuch as they do not conform to the principles of a democratic and pluralistic society. Those articles seriously restrict and dampen freedom of expression. Criminal penalties such as those established in the aforementioned articles for the sake of redressing harm to reputation, are not necessary as they do not satisfy any pressing social need. Modern criminal law is governed by two basic principles: the principle of subsidiarity, which holds that criminal law must be used only when no other procedural and legal alternative can serve the same purpose; the second is the principle of ultima ratio, which means that criminal law must be perceived as a last resort.
Article 146 of the Costa Rican Criminal Code, which is the article that concerns defamation, is not a description of a separate offense; instead, it describes an exacerbated form of two other offenses: insult and calumny. This article is not up to the standards of a democratic society, as it does not have the most central element of criminal classification: its language is vague and imprecise. Expressions such as “spreads rumours or news of a kind that will affect another’s reputation” place the judge in the position of lawmaker, as it is the judge who decides what constitutes “news of a kind that will affect […] reputation.”
Article 149 of the Costa Rican Criminal Code distributes the burden of proof “very poorly.” Under this article, the defendant must prove the truth of the statements. It posits the defense of justification (exceptio veritatis) incorrectly because it applies it as an exculpatory circumstance that applies only after the violation of the law and guilt of the defendant have been decided, when in theory it is a defense that implies a justifying circumstance whereby once the truth of the assertions has been shown, there would be no crime or guilt, and the question of criminal or civil liability would be rendered moot. Article 149 of the Costa Rican Criminal Code reverses the burden of proof, violates such fundamental principles of procedure as presumption of innocence, and seriously restricts criticism of public officials. The article also makes no distinction for the type of passive subject: i.e., public officials versus private subjects. Worst of all, it has been interpreted to mean that a defendant must prove the accuracy of the charge being made in the reported statements. This kind of law induces self-censorship in reporters.
In a democratic society, the burden of proof must be distributed in such a way that a distinction is made for the passive subjects who are the targets of the allegations. A public official must prove at least two different aspects in making the case that the statements are inaccurate, and even to prove that they are defamatory: first, the public official must prove that the person who

made the statements had full knowledge that they were false; and second, that the statements were made with reckless disregard for the truth.

Article 152 of the Criminal Code, which concerns the publication of offenses against honor, is a violation of the right to seek, receive and impart information through whatever medium, because it makes it a crime to publish or reproduce such offenses and does not distinguish between matters of private interest and those of public interest. In a democratic society, under no circumstances should it be a punishable offense to impart information on matters of public interest. The Press Act bill adopts this reasoning, as it provides that dissemination of information is not a punishable offense when the information concerns matters of public interest. Article 152 of the Criminal Code has a terrible chilling effect on the exercise of the freedoms established in Article 13 of the American Convention.

The U.S. legal concept of "actual malice" has had an enormous impact not just in Latin America but worldwide. The Spanish Penal Code makes provision for this concept in its articles 204 and 207. The Costa Rican bill on freedom of expression and freedom of the press has also used the concept of "actual malice." While this bill does not incorporate the full doctrine, it does introduce important elements having to do with the subjective element of the offenses. The theory of actual malice involves other factors, such as: full knowledge that the statement is false or reckless disregard for whether it was false or not; a distinction made for the targets of the offending comments –i.e., public figures versus private persons; the principle that recourse to criminal proceedings is unnecessary; and the burden of proof on the public official.

In Costa Rica, prosecution of crimes against honor is by private parties. Proceedings are instituted by private parties, not by public prosecutors or other public authorities. Private interests are at stake and the aggrieved party may withdraw the case, reach a negotiated settlement or retract the charges. Prosecution of public action crimes involves a preliminary phase, an intermediate phase and a final phase or trial. Prosecution of crimes by private action, on the other hand, does not involve any preliminary or intermediate phase, which means that no authority has an opportunity to review the complaint or at least conduct an investigation to make a value judgment as to whether criminal prosecution is warranted. Therefore, almost all complaints alleging crimes prosecuted by private action end up going to trial and eventual judgment. In Costa Rica, such proceedings may last anywhere from one and a half to two years, even though the proceeding is a simple one. The complaint is filed directly with the court, which first convenes a hearing to explore the possibility of a negotiated settlement or retraction; absent that, it goes on to convene hearings on the criminal complaint itself, sets the trial date, and conducts the trial.

The effects of a criminal conviction in Costa Rica are of three kinds: the first is legal; the second professional and the third personal. The legal effect of a conviction is the judgment. However, in Costa Rica a conviction also means that one's name will be listed in the Judiciary's Record of Convicted Felons and one loses any chance of being granted such benefits as a stay of execution of sentence. The civil effects would be payment of any fines and fees ordered, and possible attachments or garnishments or property losses. Conviction of a crime has serious personal and professional consequences as well, which has a deterrent and intimidating effect on someone in the media business.

The right to appeal the conviction to a higher court, recognized in Article 8 of the American Convention, means that the accused has the right to have the ruling, in all its parts, reviewed on the facts, on the law and, most especially, on the sentence. Due process is an integral part of this

right. In the Costa Rican system, however, a convicted person has only one remedy to challenge a conviction, which is the extraordinary remedy of cassation.
A writ of cassation is not a full appeal and is not an appeal in the meaning of Article 8 of the American Convention. A writ filed with a court of cassation will not set the stage for a complete review of a judgment, both on the facts and the law. The review done by the Court of Criminal Cassation is very narrow in scope and confined exclusively to matters of law. The court of cassation will not deal with three fundamental aspects: it will not re-assess the evidence; it will not review the facts; and it will not venture beyond the claims of the parties exercising this remedy. Although some progress has been made in Costa Rica toward ridding the cassation procedure of some of its formalities, it continues to be a very formalistic remedy that is very narrow in scope. Costa Rica has to broaden the scope of this remedy, rid it of some of the formalities that accompany it, enable it to serve more purposes so that it becomes a remedy by means of which justice can be served in a particular case, without sacrificing oral arguments. In 1990, with Order 528 of the Constitutional Chamber of the Costa Rican Supreme Court, initial steps were taken to eliminate some of the procedural formalities associated with the writ of cassation, in response to recommendations made by the Inter-American Commission on Human Rights, which asked Costa Rica to amend its laws. The Constitutional Court ordered that the remedy be "de-formalized". But more progress is needed.
In the instant case, the review done by the Third Chamber of the Costa Rican Supreme Court was the kind of narrow review typical of cassation. That Chamber could not examine the facts and had to accept them as established by the sentencing court.
The right to a hearing by an impartial court or judge, recognized in Article 8(1) of the American Convention, presupposes that the court that reviewed a verdict of acquittal and nullified it cannot then review a verdict of conviction in the same case. In cases it has already reviewed and decided the Costa Rican Court of Cassation has been careful to avoid violating the principle of impartiality and to that end keeps a list of alternate justices to hear cases that come up for review a second time. In the case of Mr. Mauricio Herrera Ulloa, however, the Third Chamber of the Costa Rican Supreme Court did not observe his right to be heard by an impartial court. The Third Chamber had already ruled on a writ of cassation filed in this very same case and had nullified the May 29, 1998 verdict of acquittal on the grounds that the sentencing court had misused the concept of malice, which was prejudicial to an issue that went to the merits.

f. Expert testimony of Federico Sosto López, attorney

International treaties do not outrank the Costa Rican Constitution, as the latter provides that "treaties rank above the law, but are subordinate to the Constitution."
Article 13 of the Convention is very clear. The text of that article refers to freedom of thought and expression and in that sense is slightly different from the structure of other international instruments. As a rule, freedom of thought, conscience and religion are all covered in the same article. The freedom of the press of which Article 13 speaks is broader in scope than the traditional notion of that freedom in that Article 13 protects the right to receive, seek and impart information and ideas.
Protection of every person's freedom of expression would be based on what we call freedom of opinion. It is freedom of the press that enables the mass media to impart information and ideas.
"Freedom of expression is in essence the possibility of disseminating the thoughts and ideas of others." In the American Convention provision is made for receiving and seeking information.

Freedom of information is an extension of freedom of expression, enabling the individual to affirm his personal values.

"Every international instrument is a product of its time; the same can be said for the language or expressions that the instrument uses." Article 13 speaks of freedom of thought and expression. The phrase 'freedom of expression' has a number of connotations that have developed with the passage of time. While we speak of freedom of expression in general terms, we also call it freedom of information, freedom of the press, freedom of communication. The Nice Declaration even speaks of freedom of the media. Any interpretation of the Convention must take into account that it is a living instrument for the protection of human rights. Reputation is a matter of particular importance because the exercise of freedom of expression has made the right to a good name much more vulnerable to attack. When rights are exercised there is always the possibility that other rights might be infringed. The goal is to strike the proper balance.

Article 13(2) of the Convention is a lesson in the importance of being able to establish limits; in other words, if this right is to be lawfully exercised, certain parameters and contextual considerations have to be observed. The text of the American Convention makes it clear that freedom of expression can be restricted. These restrictions are intended to protect every person's right to have his honor respected. The European Convention provides that the restrictions on the exercise of freedom of expression must be prescribed by law, have a legitimate purpose and be necessary and justified.

The American Convention attributes fundamental importance to the right to have one's honor respected, precisely because it can be more vulnerable or more grievously affected.

The American Convention is neutral on the question of penalization of offenses against honor. It is an option that the Convention leaves to the domestic laws of each country. In Costa Rica's case, it is constitutionally permissible.

Costa Rica needs to take a fresh look at penalties for offenses against honor, since such offenses are not per se violations of the American Convention. Up until now, criminalization and punishment of offenses against honor has proven to be an effective means to protect it.

As for the question of whether violations of the right to have one's honor respected should be penalized in a democratic society, the expert believes that while freedom of expression is essential for a democratic society, it is even more essential for the individual. Freedom of thought, freedom of expression, and the possibility of expression in all its dimensions: these are the individual's mainstay.

g. Expert testimony of Luis Alberto Saénz Zumbado, attorney and journalist

The press is an institution of enormous importance in today's society, an institution in which journalists are the central players, with businesses being the neuralgic points in the infusion of capital and technology. The press as institution enables the exercise of a number of freedoms and a right on a massive scale. Without the press, modern society would be unable to engage in the free flow of opinions and information.

The right of the societies of this hemisphere to be informed was fully confirmed when the American Convention entered into force. Article 13 of the Convention upholds freedom of information as a separate right. In the modern world, it is the press that makes the exercise of that right possible, inasmuch as it affords societies access to information.

In democratic societies, the free flow of information is essential to enabling the formation of opinion, which is the basis of the sharing of ideas. The press, therefore, has a unique

responsibility in seeking, gathering, investigating and imparting information. Because information is essential to enabling the formation of opinions, the press has an obligation to provide society with information that reflects the fact or event being reported as accurately as possible.

In reality, information is a collection of versions of a particular event or fact. News, a term used by the press to refer to information, are versions of facts or events recounted directly by the journalist himself or taken from other sources that portray themselves as original sources because they witnessed the facts or events, were the protagonists of those facts or events, or had knowledge of them. Pluralism in reporting is assured when the news is drawn from a number of versions, thus enabling the public to be better informed and develop a more-informed opinion of facts and events.

In those cases where the information must come from third parties because the journalist himself was unable to witness the event or fact, the journalist must make certain that the versions used in his reporting reflect the event or fact in question as accurately as possible. A comparison of versions is essential, as it helps the journalist discharge his obligation of informing the public and satisfies the public's right to be informed.

Article 32(2) of the Convention provides that the rights of each person are limited by the rights of others. The Convention does not make some rights more important than others, or make rights subordinate to other rights. Exercise of a right cannot mean the violation of another right. Even Article 13 of the Convention provides that the exercise of freedom of expression, the articulation of one's opinions and ideas and the possible ways that one can express oneself are not without their limits.

In the business where the expert witness worked, it is "the obligation of journalists and correspondents to draw their information […] from at least two sources; two sources […] mean[s] that any version of a fact or event obtained from one source would have to be compared and contrasted with at least one other news source." This makes sense in a democratic society, where information helps build public opinion; a plurality of sources will better guarantee the quality of the information.

Privacy must be distinguished from private life. "What a public official does in his private life [...] is indeed reportable information, because it would generate a public interest. Acts of privacy are not reportable."

C) EVIDENCE ASSESSMENT

Documentary Evidence Assessment

67. In this case, as in others, [FN19] the Court accepts the probatory value of those documents that were submitted by the parties at the appropriate procedural moment or as evidence to facilitate adjudication of the case, which was not disputed nor challenged and the authenticity of which was not questioned.

[FN19] Cf. Case of Maritza Urrutia, supra note 7, para. 52; Case of Myrna Mack-Chang, supra note 7, para. 128; and Case of Bulacio, supra note 7, para. 57.

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68. The evidence submitted during all stages of the proceeding has been included in a single body of evidence, for it to be considered as a whole, [FN20] which means that the documents supplied by the parties with regard to the preliminary objections and the provisional measures are also part of the body of evidence in the instant case (supra paragraphs 59 and 60).

[FN20] Cf. Case of Myrna Mack-Chang, supra note 7, para. 129; Case of Bulacio, supra note 7, para. 68; and Case of Juan Humberto Sánchez. Judgment of 7 June 2003. Series C No. 99, para. 60.

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69. The Court is admitting into evidence the affidavit that Laura Mariela González Picado gave in the presence of a public civil servant, pursuant to the President's February 18, 2004 order (supra para. 37), inasmuch as it fits the intended purpose as defined by the Court. It will assess that affidavit in the body of evidence, applying the rules of logic.

70. The documents provided by witnesses Mauricio Herrera Ulloa and Fernán Vargas Rohrmoser and by expert witness Rubén Hernández Valle (supra paragraphs 51, 62, 63 and 64) at the public hearing on preliminary objections and possible merits, reparations and costs held on April 30 and May 1, 2004, and those presented by the alleged victims' representatives in their final written pleadings (supra para. 65) will be useful to the Court when deciding the present case, especially inasmuch as they were neither challenged nor contested, and their authenticity or veracity was never called into question. The Court is therefore adding them to the body of evidence, in application of Article 44(1) of the Rules of Court.

71. With respect to the press articles presented by the parties, this Court has considered that, even though they are not documentary evidence stricto sensu, they can be assessed when they refer to well-known public and notorious facts, or statements by State officials, or corroborate aspects of the instant case. [FN21]

[FN21] Cf. Case of Myrna Mack-Chang, supra note 7, para. 131; Case of Bulacio, supra note 7, para. 63; and Case of Juan Humberto Sánchez, supra note 20, para. 56.

Testimonial and Expert Evidence Assessment

72. The Court admits into evidence the statements made by the alleged victims in the instant case (supra, paragraphs 66.a and 66.b) insofar as those statements serve the purpose of the examination proposed by the Commission. As this Court has held, both for the merits and for reparations the testimony of the alleged victims and their next of kin is useful insofar as they can provide additional information on the consequences of the violations that may have occurred. [FN22]

[FN22] Cf. Case of Maritza Urrutia, supra note 7, para. 53; Case of Myrna Mack-Chang, supra note 7, para. 132; and Case of Bulacio, supra note 7, para. 66.

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73. As for the expert opinions offered as evidence (supra paragraphs 66.c, 66.d, 66.e, 66.f and 66.g), which were neither challenged nor contested, the Court admits them and regards them as evidence.

74. The Court will therefore assess the probatory value of the documents, testimony, and expert opinions submitted in writing or rendered before the Court. Evidence submitted at all stages of the proceedings has been combined into a single body of evidence, which is taken as a whole. [FN23]

[FN23] Cf. Case of Maritza Urrutia, supra note 7, para. 57; Case of Bulacio, supra note 7, para. 68; and Case of Juan Humberto Sánchez, supra note 20, para. 60.

VII. PRELIMINARY OBJECTIONS

75. The State filed the following preliminary objections:

1) failure to exhaust the following domestic remedies: a) legal action challenging constitutionality, in the case of Mr. Mauricio Herrera Ulloa; b) petition for review, in the case of Mr. Mauricio Herrera Ulloa; and c) petition seeking habeas corpus relief in the case of Mr. Fernán Vargas Rohrmoser; and
2) alleged "belated introduction" (and even material nonexistence) of the court order alleged to have caused Mr. Vargas Rohrmoser harm.

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FIRST PRELIMINARY OBJECTION

Failure to exhaust domestic remedies

The State's allegations

76. The State pointed out that under articles 10 and 48 of the Constitution of Costa Rica, there are four judicial mechanisms that ensure the exercise of human rights to all persons subject to its jurisdiction: 1) a legal action filed to challenge constitutionality; 2) judicial consultation on constitutionality; 3) the remedy of habeas corpus, and 4) the remedy of amparo. These remedies were not exhausted. It alleged that:

a) Law No. 7135, the Constitutional Jurisdiction Act of October 11, 1989, states that the purpose of a legal action challenging constitutionality is to combat laws and other general provisions that violate, either by action or omission, some constitutional precept or principle;

b) under the Costa Rican system, any private party may file an action challenging constitutionality either through a "judicial motion or through legal action." The "motion" applies when a court decision is pending, even in the case of petitions of habeas corpus or amparo, or in the proceeding to exhaust the administrative avenue. Challenging a provision or act as unconstitutional is a reasonable means to protect a subjective right or a legitimate interest believed to have been wronged. The "legal action" avenue is broader in the sense that anyone has active legal standing to bring the action, regardless of whether that person is claiming direct or indirect injury. No court decision need be pending and the action can be brought to defend diffuse interests or the interests of the group as a whole;

c) the efficacy of an action challenging constitutionality stems from the effects that follow from a finding of unconstitutionality when an action is filed alleging that a provision does not apply because it is contrary to the Constitution or a violation of some fundamental right contained in international human rights instruments. Those effects, which are retroactive for the accused or convicted, are: nullification of the provision or act being challenged; res judicata; elimination of the provision or act from the juridical system; grounds for suspension of the statute of limitations, and grounds for prejudiciality;

d) an action challenging constitutionality is an effective and adequate domestic remedy that would have enabled Costa Rica's Constitutional Court to examine the criminal law that criminals and punishes offenses against honor and that was used to convict Mr. Herrera Ulloa, to determine whether it was contrary to Article 13 of the Convention;

e) Mr. Herrera Ulloa had legal standing to use the action challenging constitutionality as a remedy by which to combat the alleged violation of his basic rights;

f) the alleged victims and their attorney filed a writ of cassation with the Third Chamber of the Costa Rican Supreme Court, although they "at least foresaw" that a conviction might have been a violation of articles of the Constitution and of the American Convention and that the procedure required to challenge constitutionality in a case not yet decided would have been a "motion", not a legal action filed with the Supreme Court;

g) under Article 408.g of Costa Rica's Penal Code, the remedy of review may be used to review convictions that have become final but were not delivered in accordance with the rules of due process;

h) if a judgment has become final and there has been, as the representatives of the alleged victims claim, a violation of due process, then the basic conditions for filing an appeal for review have been met; yet this domestic remedy was not exhausted;

i) although an appeal seeking review of a final verdict has traditionally been regarded as an extraordinary remedy, in the Costa Rican legal system it is permissible when violations of due process are being claimed. It thus becomes an effective and adequate means to resolve violations of this type, which the alleged victims should have exhausted before turning to the Court. Its efficacy can be attributed to its informality, to the procedure through which the appeal is processed, to its legal effects and to the fact that "evidence can be offered orally, in a hearing held for that very purpose;"

j) under Costa Rican law, a court taking cognizance of an appeal for review of a criminal case must, before deciding the appeal, consult the Constitutional Chamber as to the content, preconditions and scope of the principles or rights alleged to have been violated. This is a "true guarantee" for anyone who files an appeal for review, because any ruling delivered by Costa Rica's highest and only constitutional court "as regards the rights and principles alleged to have been violated, is binding;"

k) if the appeals court decides to vacate a lower court judgment, the case must be sent back for retrial if the appellate court does not have sufficient material to decide the case; if it does have that information, the appellate court can decide the case once and for all;
l) the April 3, 2001 decision ordering enforcement of the conviction in all its parts could potentially have endangered Mr. Vargas Rohrmoser's freedom of movement or personal liberty, in which case the petition of habeas corpus would have been the proper procedural remedy to protect that freedom of movement. As Mr. Vargas Rohrmoser did not avail himself of this procedural remedy that the Costa Rican judicial system affords, he did not exhaust domestic remedies;
m) Mr. Fernán Vargas Rohrmoser has not been denied his freedom of expression and thought, and no definitive verdict against him has been delivered. The April 3, 2001 court order being contested here is a simple procedural decision. Indeed, procedurally speaking, he never had need of a court of second instance and cannot claim violation of the principle of presumption of innocence or violation of his right to a hearing by a competent and impartial judge; and
n) based on these considerations, the State argued that Article 46(1)(a) of the American Convention was applicable and, accordingly, asked the Court to admit the preliminary objection asserting failure to exhaust local remedies.

Pleadings of the Commission

77. Concerning the State's preliminary objection claiming failure to exhaust domestic remedies, the Inter-American Commission asked the Court to reject each and every one of Costa Rica's arguments on the grounds that:

a) The only remedies that need be exhausted are those appropriate for correcting the violations allegedly committed. In cases such as the present case, in which a conviction was challenged through the ordinary remedies available within Costa Rica's criminal law system, the avenue that Mr. Herrera Ulloa opted for was the proper one;
b) the State failed to show that the remedy challenging constitutionality is, or could have been, an effective and adequate remedy for resolving the present case;
c) the State alleged that the action challenging constitutionality "is the principal means to have a provision that violates fundamental rights declared inapplicable;" yet the main ground for the petition is not the existence of the law applied, but rather the penalty imposed upon the alleged victims in the November 12, 1999 court ruling and the February 21, 2000 order for enforcement of judgment;
d) the State is confusing the object of the petition filed with the Commission with the object of the case brought to the Court. The object of the present case is the criminal sanction imposed on Mr. Herrera Ulloa and the court's demand of Mr. Vargas Rohrmoser, in violation of Article 13 of the Convention. "Therefore, with the final ruling delivered by the Supreme Court [...] the suitable and effective remedies have been exhausted;"
e) Review can only be requested when the right of due process or the right of defense during trial has been violated; this case, however, is "against" the criminal conviction, because the criminal penalty it establishes is incompatible with articles 2 and 13 of the Convention. No violation of due process is being claimed; in other words, no violation of articles 8 and 25 of the Convention is being alleged. The remedy of review could not have been used to challenge the

conviction on the grounds that it was contrary to Article 13 of the Convention; this argument alone is sufficient to dismiss the preliminary objection;
f) the State never invoked the exception for failure to exhaust the remedy of review, which means that it tacitly waived this exception. Therefore, by virtue of the principle of estoppel, it is now too late for Costa Rica to invoke the exception for failure to exhaust domestic remedies with regard to the remedy of review;
g) the State has tacitly waived the exception alleging Mr. Fernán Vargas Rohrmoser's failure to exhaust domestic remedies with regard to the petition of habeas corpus, since that objection was not raised during the proceeding before the Commission;
h) the State did not expressly state how the petition of habeas corpus would have served as an effective and suitable remedy that Mr. Vargas Rohrmoser should have exercised;
i) assuming, arguendo, that the petition of habeas corpus could have been filed, it would have been ineffective based on the jurisprudence of the Constitutional Chamber of Costa Rica's own Supreme Court, which declared that the petition of habeas corpus was not the proper remedy to appeal convictions in criminal cases or to appeal court orders for enforcement of those criminal convictions; and
j) the petition of habeas corpus was neither suitable nor effective for purposes of remedying the consequences of noncompliance with the April 3, 2001 order for enforcement of the sentence delivered against Mr. Vargas Rohrmoser.

Pleadings of the representatives of the alleged victims

78. For their part, the alleged victims' representatives petitioned the Court to reject in limine the preliminary objection claiming failure to exhaust the remedies of domestic law. The representatives argued that:

a) in its brief of August 10, 2001, presented to the Commission with regard to the admissibility of the petition that gave rise to the present case, the State did not invoke Article 46(1)(a) of the American Convention, which requires prior exhaustion of the remedies under domestic law;
b) in a later brief, dated November 30, 2001, the State alleged that Mr. Mauricio Herrera Ulloa had not attempted to bring an action challenging constitutionality. This, according to the State, was the only remedy that, under Costa Rica's Constitutional Jurisdiction Act, Mr. Herrera Ulloa would have been entitled to invoke. The State cited his failure to exhaust that remedy as grounds for eventual application of Article 46(1)(a) of the Convention. In its briefs answering the petition filed with the Commission, the State tacitly waived the exception for failure to exhaust domestic remedies that it now invokes, except in the case of the action challenging constitutionality;
c) even though Costa Rica's objection claiming failure to exhaust domestic remedies could have been regarded as "belated" and "vague" in its construction and could have been have been dismissed in limine, the Commission examined it all the same and then dismissed it;
d) the argument asserting failure to exhaust domestic remedies, which the State claimed in its brief answering the application filed with the Court, is a belated one, as the Commission was the body that should have decided this question; therefore the State is understood as having tacitly waived this defense;

e) while the action challenging constitutionality provided for in the Constitution and elaborated upon in Article 75 of the Constitutional Jurisdiction Act is a legal action whose effects are to nullify erga omnes a provision or law on the grounds that it is unconstitutional, it is mainly an incidental proceeding;

f) the action challenging constitutionality is an extraordinary remedy regulated by a special law. In theory, at least, such an action can be used to challenge the public authorities' interpretation or application of a legal norm. In Mr. Herrera Ulloa's case, however, until the conviction came down he had no way of knowing how the law alleged to be in violation of the Convention would be interpreted and, by extension, how the court would apply it to his specific case;

g) in the case filed with the Court, the alleged victims were acquitted by the court of first instance and therefore did not have legal standing to bring an action challenging constitutionality. When the Supreme Court upheld the later conviction, which made it final, the action challenging constitutionality could no longer be filed as there was no longer any criminal proceeding underway, which is a precondition under Costa Rican law. The alleged victims could not then –and cannot now- bring the action challenging constitutionality to which the State alludes to support its claim that the case is inadmissible;

h) Article 8(1) of the Constitutional Jurisdiction Act requires the organs of the administration of justice to desist from applying any provision found to be contrary to the Constitution, either ex officio or at the request of a party; in case of doubt, an organ for the administration of justice must refer the matter to the Constitutional Court. In the instant case, it was the judge hearing the case who, "as the presiding and sentencing judge," should have taken steps to determine whether the criminal law he was going to invoke was compatible with the Convention;

i) the alleged victims made the case to the Third Chamber of the Costa Rican Supreme Court that the Criminal Court of the First Judicial Circuit of San José did not have jurisdiction to amend the juridical determination of the facts denounced by the party filing the criminal complaint. But the Third Chamber of the Costa Rican Supreme Court ruled that "the court […] does have the authority to determine [the substantive object of the proceeding] based on the corresponding legal description of the crime [and …] has an obligation to alter the crime charged to the one it deems best fits the facts;"

j) Mr. Mauricio Herrera Ulloa did not know what crime he was charged with until the guilty verdict was delivered. In practice, an action filed to challenge constitutionality during a criminal proceeding is "an entirely unpredictable exercise," since the "crimes charged by the accuser are irrelevant," as confirmed by the experts who testified in the public hearing held by the Court;

k) an action challenging constitutionality is not an ordinary remedy, but a very specific action different from all other domestic remedies; the proceeding involved is costly, difficult and lengthy;

l) applying the State's interpretation, the argument that an action challenging constitutionality must be filed in order for domestic remedies to be considered pursued and exhausted would mean that cases where the sentencing court orders damages that are irreparable for the alleged victims could not be brought to the Commission or to the Court if those court rulings are enforced. In effect, to file an action challenging constitutionality in Costa Rica, a case must still be pending with the courts;

m) the alleged victims could not have required to file an action challenging the constitutionality of their conviction to exhaust domestic remedies before turning to the inter-

American system since, under Article 10 of Costa Rica's Constitution, actions challenging the constitutionality of convictions are impermissible;

n) an action challenging constitutionality is not a remedy that must be pursued and exhausted in accordance with Article 46(1) of the Convention, because it is not an ordinary remedy under generally accepted principles of international law and is not an effective remedy for purposes of protecting the violated rights;

o) under Costa Rican criminal procedural law, a petition seeking review is only permitted when, in case ending in a conviction, some right of defense per se is said to have been violated. Therefore, under Costa Rican procedural law, a violation of any other aspect covered under the guarantee of due process cannot be protected by filing for habeas corpus relief, pursuant to Article 408.g of the Costa Rican Code of Criminal Procedure;

p) in Mr. Herrera Ulloa's case, the violations of due process alleged in the brief of pleadings, motions and evidence that the alleged victims' representatives filed with the Inter-American Court are threefold, namely: a) the right to appeal a judgment to a higher court; b) the right to a hearing by an impartial court or judge; and c) the right to be presumed innocent. Violation of Mr. Herrera Ulloa's right of defense has not been claimed. His circumstances were such that he did not have standing to file an appeal seeking review of the guilty verdict;

q) in the instant case, the one remedy allowed against the guilty verdict delivered by the Criminal Court of the First Judicial Circuit of San José, namely the remedy of cassation, was pursued and exhausted;

r) none of the remedies that the State mentioned in its brief answering the application and its observations on the brief of pleadings, motions and evidence rises to the standards of adequacy and effectiveness that the Convention and general international law require in order for the exception claiming failure to pursue and exhaust the remedies under domestic law to prosper;

s) a petition of habeas corpus would not protect Mr. Fernán Vargas Rohrmoser's right to personal liberty in the face of the April 3, 2001 court order; his failure to comply with that court order within the time period that the Criminal Court specified could have resulted in indictment on charges of contempt of authority, as provided in Article 307 of the Penal Code. The court could have sentenced him to prison; and

t) the petition seeking habeas corpus relief was not an adequate and effective procedural remedy that Mr. Vargas Rohrmoser was required to exhaust before turning to the inter-American system, since under Costa Rica's constitutional procedural system, petitions of habeas corpus are not permitted against judgments delivered by criminal courts or against criminal court orders or acts.

Considerations of the Court

79. The broad terms of the wording of the Convention indicate that the Court exercises full jurisdiction over matters pertaining to a case, which includes competence to rule on the procedural prerequisites that are the basis for its authority to hear a case. [FN24]

[FN24] Cf. Case of Juan Humberto Sánchez, supra note 20, para. 65; Case of 19 Merchants. Preliminary Objection. Judgment of June 12, 2002. Series C No. 93, para. 27; and Case of Constantine et al. Preliminary Objections. Judgment of September 1, 2001. Series C No. 82, para. 71.

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80. Article 46(1)(a) of the Convention provides that for the Commission to admit a petition or communication lodged in accordance with Articles 44 or 45, the remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law.

81. The Court has established criteria that have to be taken into account in the instant case. Firstly, the respondent State may expressly or tacitly waive invocation of the rule requiring exhaustion of domestic remedies. [FN25] Secondly, in order to be timely, the objection that domestic remedies have not been exhausted should be raised during the first stages of the proceeding or, to the contrary, it will be presumed that the interested State has waived its use tacitly. [FN26] Thirdly, in previous cases the Court has held that non-exhaustion of domestic remedies is purely an admissibility issue and that the State that alleges non-exhaustion must indicate which domestic remedies should be exhausted and provide evidence of their effectiveness. [FN27]

[FN25] Case of Mayagna (Sumo) Awas Tingni Community. Preliminary Objections. Judgment of February 1, 2000. Series C No. 66, para. 53; Case of Loayza-Tamayo. Preliminary Objections. Judgment of January 31, 1996. Series C No. 25, para. 40; and Case of Castillo-Páez. Preliminary Objections. Judgment of January 30, 1996. Series C No. 24, para. 40.
[FN26] Case of Mayagna (Sumo) Awas Tingni Community. Preliminary Objections, supra note 25, para. 53; Case of Castillo Petruzzi et al. Preliminary Objections. Judgment of September 4, 1998. Series C No. 41, para. 56; and Case of Loayza-Tamayo. Preliminary Objections, supra note 25, para. 40.
[FN27] Case of Mayagna (Sumo) Awas Tingni Community. Preliminary Objections, supra note 25, para. 53; Case of Durand and Ugarte, Preliminary Objections. Judgment of 28 May 1999. Series C. No. 50, para. 33; and Case of Cantoral Benavides. Preliminary Objections. Judgment of September 3, 1998. Series C No. 40, para. 31.
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82. In its submission of November 30, 2001, the State raised the issue of non-exhaustion of domestic remedies with the Commission, [FN28], but the only remedy not exhausted that the State cited was the “action challenging constitutionality.”

[FN28] Cf. Brief answering the questions posed by the Inter-American Commission on Human Rights at the November 16, 2001 hearing (file of proceedings with the Inter-American Commission on Human Rights, volume II, folios 273 to 277).
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83. Based on the criteria cited above (supra para. 81), the Court finds that inasmuch as the State did not allege a failure to exhaust the remedies of review and habeas corpus during the proceedings before the Inter-American Commission, it implicitly waived one means of defense that the American Convention creates in its favor, and tacitly admitted that such remedies either

do not exist or were exhausted in a timely manner. [FN29] Therefore, the principle of estoppel prevents the State from raising this argument, for the first time, in its brief answering the application and its observations on the written brief of pleadings, motions and evidence (supra para. 33).

[FN29] Cf. Case of Mayagna (Sumo) Awas Tingni Community. Preliminary Objections, supra note 25, para. 56; Case of Castillo-Petruzzi et al. Preliminary Objections, supra note 26, para. 56; and Case of Loayza-Tamayo. Preliminary Objections, supra note 25, para. 43.

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84. A different situation presents itself in the case of the "action challenging constitutionality," since in its November 30, 2001 brief, during the admissibility proceeding conducted by the Inter-American Commission on Human Rights, the State argued the failure to substantiate this remedy.

85. The Court is compelled to point out that the action challenging constitutionality is an extraordinary recourse whose purpose is to question the constitutionality of a law, not to have a court ruling reviewed. Hence, the action challenging constitutionality cannot be counted among the domestic remedies that a petitioner is necessarily required to pursue and exhaust.

86. In its Admissibility Report No. 128/01 of December 3, 2001, the Commission wrote that the "central object of the petition" filed with the Commission was the sanction that the November 12, 1999 judgment the Criminal Court of the First Judicial Circuit of San José imposed, and that by filing a writ of cassation, the alleged victims had exhausted the domestic remedies. [FN30]

[FN30] Cf. Admissibility Report of the Inter-American Commission on Human Rights No. 128/01 (file of the proceeding before the Inter-American Commission on Human Rights, Volume II, folio 296).

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87. The Court has no grounds to re-examine the Commission's reasoning, which is completely consistent with the relevant provisions of the Convention. The Court, therefore, dismisses the first preliminary objection.

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SECOND PRELIMINARY OBJECTION

Alleged "belated introduction" (and even material nonexistence) of the court order alleged to have caused Mr. Vargas Rohrmoser harm

The State's allegations

88. The State's arguments for the second preliminary objection were as follows:

a) the court order issued in the case of Mr. Vargas Rohrmoser was dated April 3, 2001, which meant that it was delivered subsequent to the date on which the petition with the Commission was filed;
b) subsequent to April 3, 2001, no brief was ever filed with the Commission asking that it expand upon the alleged victims' petition so as to include that court order. For that reason, the April 3, 2001 order "ought not to be litigated, inasmuch as there is no express statement to the effect" that it is included;
c) if that court order is ruled out, then "Mr. Vargas Rohrmoser's cause for complaint would disappear and he would have no standing to request this Court's protection";
d) in the evidence the Commission supplied as annexes to the application, one "does not find either the order itself or a citation from the April 3, 2001 judgment it." In the brief of pleadings, motions and evidence, the representatives of the alleged victims "state that the order for enforcement of judgment, dated April 3, 2001, appears in Annex 9; such is not the case;" and
e) the April 3, 2001 court order, the only court ruling that went against Mr. Vargas Rohrmoser, was not introduced by the alleged victims' representatives; instead, it was done by the Commission ex officio, which is why its exclusion is being requested.

Pleadings of the Commission

89. The Inter-American Commission asked the Court to dismiss the second preliminary objection, in each and every one of the arguments presented by Costa Rica. It asserted that:

a) the development of a case filed with the inter-American system does not stop when a petition is filed with the Commission. When new facts occur that materially affect the case, the Commission can and indeed must take them into account. The inclusion of supervening evidence must be considered provided the right of defense and the principle of juridical certainty are preserved;
b) the State's request that the information or supervening evidence be precluded must be rejected since the April 3, 2001 court order is a direct consequence of the February 21, 2001 order for enforcement of judgment delivered by the Criminal Court of the First Circuit of San José, which ordered Mr. Vargas Rohrmoser to make good on the penalty imposed on the newspaper "La Nación" in the November 12, 1999 judgment;
c) the State had full knowledge of the April 3, 2001 decision from the time it was delivered by one of its own courts; and
d) Costa Rica cannot request that the April 3, 2001 decision be precluded as that decision does not alter the facts; instead, it confirms them.

Pleadings of the alleged victims' representatives

90. Concerning the preliminary objection raised by the State alleging that a court order involving Mr. Vargas Rohrmoser was introduced belatedly and indeed not tangibly presented at all, the alleged victims' representatives petitioned the Court to reject each and every argument, based on the following reasoning:

a) the April 3, 2001 court decision ordered enforcement of the judgment that found Mr. Herrera Ulloa and the "La Nación" newspaper jointly and severally liable, and dismissed the "petition seeking reversal and concomitant nullification" filed by the alleged victims against the court order for execution of judgment issued on February 21 of that year. The important thing is to have presented the February order being challenged, which became final with the order of April 3, 2001;
b) the threat to Mr. Vargas Rohrmoser's freedom "does not originate" with the April 3, 2001 decision; it stems from that provision of the Penal Code that describes the crime of contempt;
c) there is no arguing the existence of the April 3, 2001 ruling, irrespective of what was forwarded to the Court as an annex to the Commission's application. The State attempted to deny the very existence and relevance of a court decision that it expressly included in its brief of November 30, 2001; and
d) all domestic remedies were pursued and exhausted in the case of Mr. Vargas Rohrmoser, which is why the State's objection has no valid foundation in the law.

Considerations of the Court

91. As for the alleged belated introduction of the April 3, 2001 order, the Court finds that while it was indeed a court action that occurred after the petitioners had filed their petition with the Commission on March 1, 2001 ((supra para. 6), it is still part of the body of evidence in the present case (supra para. 68) and was introduced in the course of the proceedings with the inter-American system for the protection of human rights. On May 10, 2001, when provisional measures on Mr. Mauricio Herrera Ulloa's behalf were requested, a copy of that court order was presented. It should be recalled that the body of evidence in a case is unique and indivisible and is composed of the evidence submitted during all stages of the proceeding, [FN31] so the documents contributed by the parties with respect to the preliminary objections are also part of the evidence in the instant case (supra para. 68).

[FN31] Cf. Case of Myrna Mack-Chang, supra note 7, para. 129; Case of Bulacio, supra note 7, para. 68; and Case of Juan Humberto Sánchez, supra note 20, para. 60.

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92. The order in question is a juridical consequence of the conviction that the alleged victims challenge and is part of a proceeding before the inter-American system for the protection of human rights and cannot be analyzed in isolation.

93. As for the "material non-existence" of the order in question, the latter was delivered by one of the State's own courts; the State cannot be ignorant of it.

94. Given the foregoing, the Court dismisses the preliminary objection claiming the "belated introduction" and "material non-existence" of the April 3, 2001 order as being unfounded and inadmissible.

VIII. PROVEN FACTS

95. Having examined the documents, the statements of the witnesses, the opinions of the experts and the pleadings of the Commission, of the alleged victims' representatives and of the State during the course of the present proceeding, this Court deems the following facts proven:

With respect to Mr. Mauricio Herrera Ulloa

95(a) Mr. Mauricio Herrera Ulloa has worked at the "La Nación" newspaper for twelve years. At the time of the events in the instant case, he was working as a journalist in the newspaper's political affairs section. [FN32]

[FN32] Cf. testimony of Mr. Mauricio Herrera Ulloa given before the Inter-American Court of Human Rights during the public hearing held on April 30, 2004; and articles published in the newspaper "La Nación" (file of annexes to the application, volume I, annex 6, folios 694-698).

With respect to Mr. Fernán Vargas Rohrmoser

95(b) Mr. Fernán Vargas Rohrmoser is currently vice chairman of the Board of Directors and general agent for the newspaper "La Nación". At the time of the events in the instant case, Mr. Vargas Rohrmoser was chairman of the Board of Directors and legal representative of "La Nación." [FN33]

[FN33] Cf. testimony of Mr. Fernán Vargas Rohrmoser given before the Inter-American Court of Human Rights during the public hearing on April 30, 2004; and chapter IX on the civil damages suit in Judgment Number 1320-99, November 12, 1999 of the Criminal Court of the First Judicial Circuit of San José, Group Three, San José (file of annexes to the application, volume II, annex 8, folio 1213).

With respect to the first series of articles that "La Nación" published

95(c) Before publishing various articles, Mr. Herrera Ulloa followed the routine procedure at "La Nación" for checking a story. [FN34]

[FN34] Cf. testimony of Mr. Mauricio Herrera Ulloa given before the Inter-American Court of Human Rights during the public hearing held on April 30, 2004; testimony of Mr. Fernán Vargas Rohrmoser given before the Inter-American Court of Human Rights during the public hearing held on April 30, 2004.

95(d) On May 19, 1995, the newspaper "La Nación" carried an article titled "Diplomático nacional cuestionado en Bélgica" ["Questions about a Costa Rican diplomat in Belgium"]. In that article, journalist Mauricio Herrera Ulloa, a writer for that paper, reported a portion of a

news story that “Le Soir Illustré” reported based on an investigation conducted by the newspaper Financieel-Ekonomische Tijd (FET) that linked Mr. Félix Przedborski, Costa Rica’s delegate to the International Atomic Energy Agency (IAEA)- to a number of illicit activities. [FN35]

[FN35] Cf. article published in the newspaper “La Nación” of May 19, 1995 (file of annexes to the application, volume I, folio 694); translation of the article titled “L étrange monsieur” published in the newspaper “Le Soir lllustré,” April 5, 1995 edition (file of annexes to the application, volume I, annex 6, folios 721 to 730).

95(e) On May 20, 1995, “La Nación” published an article titled “Diplomático tico controversial. Autoridades de Bélgica exonerarían a Przedborski” [“Costa Rican diplomat caught up in controversy. Belgian authorities expected to clear Przedborski”]. That article was authored by Mr. Mauricio Herrera Ulloa as a writer for that newspaper and reproduced, inter alia, a portion of the contents of a memorandum from the Office of the King’s Counsel in Liege, Belgium, favorable to Mr. Przedborski. [FN36]

[FN36] Cf. article published in the newspaper “La Nación,” 20 May 1995 edition (file of annexes to the application, volume I, annex 6, folio 695).

95(f) On May 21, 1995, “La Nación” carried an article titled “Multimillonario negocio en Europa. Nexo tico en escándalo Belga” [“Multimillion dollar deal in Europe. Costa Rican link in Belgian scandal”], also authored by Mr. Mauricio Herrera Ulloa as a staff writer with that newspaper. This May 21 article reported information taken from articles published in Le Soir Illustré”, “Financieel-Ekonomische Tijd (FET)” and “La Libre Belgique”, concerning, inter alia, Mr. Félix Przedborski’s involvement with Mr. Leon Deferm, one of the names most strongly linked to the “supposed payment of secret commissions in the sale of Italian military helicopters to the Belgian State.” [FN37]

[FN37] Cf. article published in the newspaper “La Nación,” 21 May 1995 edition (file of annexes to the application, volume I, annex 6, folio 696).

95(g) In the May 25, 1995 edition of “La Nación” Mr. Félix Przedborski published an article titled “Nací en el dolor y respeto a Costa Rica,” where the diplomat gave his version of the facts. [FN38]

[FN38] Cf. article published in the “La Nación” newspaper on 25 May 1995 (file of evidence presented during the public hearing held on April 30 and May 1, 2004, single volume, folio 3550).

With respect to the second series of articles published in “La Nación”

95(h) In following the procedure that “La Nación” uses to check stories, on November 30, 1995 Mr. Mauricio Herrera Ulloa sent Mr. Ricardo Castro Calvo, attorney for Mr. Félix Przedborski, a questionnaire concerning the facts reported in the foreign press in connection with his client. He did this prior to publishing the second set of articles, which ran on December 13, 14, 15 and 16, 1995. [FN39]

[FN39] Cf. Questionnaire that journalist Mauricio Herrera Ulloa sent to Mr. Félix Przedborski, by way of attorney Ricardo Castro Calvo (file on preliminary objections and possible merits, reparations and costs, volume I, annex f of the brief of pleadings, motions and evidence of the alleged victims’ representatives, folios 342-348); testimony of Mr. Ricardo Castro Calvo before the Criminal Court of the First Judicial Circuit of San José (file of annexes to the application, volume I, annex 7, folio 853); testimony of Mr. Mauricio Herrera Ulloa before the Inter-American Court of Human Rights during the public hearing held on April 30, 2004; and testimony of Mr. Fernán Vargas Rohrmoser before the Inter-American Court of Human Rights at the public hearing held on April 30, 2004.

95(i) On December 13, 1995, “La Nación” carried an article titled “Embajador honorario. Polémico diplomático en la mira” [“Honorary Ambassador. Diplomatic controversy in the crosshairs”], authored by journalist Mauricio Herrera Ulloa as a writer for that newspaper. The article reported, inter alia, on the formation of a high-level commission within Costa Rica’s Ministry of Foreign Affairs and Foreign Service, which in its second week of meetings proposed the elimination of all honorary diplomatic posts. The article also reproduced news that had originally appeared in the Belgian newspaper De Morgen, in an article titled “Felix Przedborski: van gangster tot diplomaat”, which stated that “ [Mr. Przedborski’s] diplomatic status put him beyond the reach of the law.” [FN40]

[FN40] Cf. article published in the newspaper “La Nación” dated 13 December 1995 (file of annexes to the application, volume I, annex 6, folios 697 and 698); and translation of the article titled “Felix Przedborski: van gangster tot diplomaat” published in the newspaper “De Morgen,” July 5, 1995 edition (file of annexes to the application, volume I, annex 6, folios 760 to 766).

95(j) Three other articles carried by “La Nación” and written by Mr. Mauricio Herrera Ulloa made reference to Mr. Félix Przedborski, but were not targeted in the criminal complaint. [FN41] On December 14, 1995, an article titled “El espinoso expediente Przedborski” [“The thorny Przedborski file”]; [FN42] on December 15, 1995, it published another article titled “Oleo de pasaportes a Przedborski” [FN43]; and on December 16, 1995, it published “Przedborski: tico tras dos intentos” [“Przedborski: Costa Rican behind two attempts”]. [FN44]

[FN41] Cf. Testimony given by Mr. Mauricio Herrera Ulloa before the Inter-American Court of Human Rights during the public hearing held on April 30, 2004; and Judgment Number 61-98 of May 29, 1998, of the Criminal Court of the First Judicial Circuit of San José, Group Three, San José (file of annexes to the application, volume I, annex 7, folios 810 to 818).
[FN42] Cf. article published in "La Nación" on December 14, 1995 (file of evidence presented during the public hearing held on April 30 and May 1, 2004, single volume, folio 3547).
[FN43] Cf. article published in "La Nación" on December 15, 1995 (file of evidence presented during the public hearing held on April 30 and May 1, 2004, single volume, folio 3549).
[FN44] Cf. article published in "La Nación" on December 16, 1995 (file of evidence presented during the public hearing held on April 30 and May 1, 2004, single volume, folio 3548).

With respect to Mr. Félix Przedborski's status as a public official at the time the articles were published

95(k) On August 20, 1976, the Ministry of Foreign Affairs, by agreement 358-SE, designated Mr. Félix Przedborski as Permanent Delegate to the International Atomic Energy Agency headquartered in Vienna. [FN45]

[FN45] Judgment Number 61-98 of May 29, 1998 of the Criminal Court of the First Judicial Circuit of San José, Group Three, San José (file of annexes to the application, volume I, annex 7, folio 826); testimony given by Mr. Félix Przedborski before the Criminal Court of the First Judicial Circuit of San José (file of annexes to the application, volume I, annex 7, folio 838); and Judgment Number 1320-99 of November 12, 1999, of the Criminal Court of the First Judicial Circuit of San José, Group Three, San José (file of annexes to the application, volume II, annex 8, folio 913).

95(l) On September 7, 1979, the Ministry of Foreign Affairs, by agreement 832-SE, designated Mr. Félix Przedborski as Chargé of Tourism Affairs ad-honorem of Costa Rica's Embassy in France. [FN46]

[FN46] Judgment Number 61-98 of May 29, 1998, of the Criminal Court of the First Judicial Circuit of San José, Group Three, San José (file of annexes to the application, volume I, annex 7, folio 826); and Judgment Number 1320-99 of November 12, 1999, of the Criminal Court of the First Judicial Circuit of San José, Group Three, San José (file of annexes to the application, volume II, annex 8, folio 913).

95(m) On April 15, 1983, the Ministry of Foreign Affairs, through agreement 173 DVM, appointed Mr. Félix Przedborski as Costa Rica's Permanent Representative to the International Atomic Energy Agency, headquartered in Vienna, with the rank of Ambassador. [FN47]

[FN47] Judgment Number 61-98 of May 29, 1998, of the Criminal Court of the First Judicial Circuit of San José, Group Three, San José (file of annexes to the application, volume I, annex 7, folio 826); and Judgment Number 1320-99 of November 12, 1999, of the Criminal Court of the First Judicial Circuit of San José, Group Three, San José (file of annexes to the application, volume II, annex 8, folio 913).

95(n) The State of Costa Rica appointed a commission to study the restructuring of the Ministry of Foreign Affairs and of the honorary diplomatic service, [FN48] which decided to revoke the appointments of the honorary diplomats, one of whom was Mr. Félix Przedborski. [FN49]

[FN48] Cf. A fact acknowledged by the State in its brief answering the application and in its comments on the written brief containing pleadings, motions and evidence (file on preliminary objections and possible merits, reparations and costs, volume II, folio 466); testimony given by Mr. Mauricio Herrera Ulloa before the Inter-American Court of Human Rights during the public hearing held on April 30, 2004; and testimony given by Mr. Félix Przedborski before the Criminal Court of the First Judicial Circuit of San José (file of annexes to the application, volume I, annex 7, folio 838).

[FN49] Cf. Testimony of Mr. Félix Przedborski before the Criminal Court of the First Judicial Circuit of San José (file of annexes to the application, volume I, annex 7, folio 838); and testimony given by Mr. Mauricio Herrera Ulloa before the Inter-American Court of Human Rights during the public hearing held on April 30, 2004.

95(o) On June 28, 1996, the Ministry of Foreign Affairs, by agreement 186-SE, “severed [Mr. Félix Przedborski] from his post as Permanent Representative of Costa Rica to the International Atomic Energy Agency;” he remained in his post until June 30, 1996. [FN50]

[FN50] Judgment Number 61-98 of May 29, 1998, of the Criminal Court of the First Judicial Circuit of San José, Group Three, San José (file of annexes to the application, volume I, annex 7, folio 826); testimony given by Mr. Félix Przedborski before the Criminal Court of the First Judicial Circuit of San José (file of annexes to the application, volume I, annex 7, folio 838); and Judgment Number 1320-99 of November 12, 1999, of the Criminal Court of the First Judicial Circuit of San José, Group Three, San José (file of annexes to the application, volume II, annex 8, folio 913).

With respect to the criminal complaints and the civil suit for damages filed against Mr. Mauricio Herrera Ulloa as criminal and civil defendant, and against the newspaper “La Nación” as civil defendant

95(p) Mr. Félix Przedborski filed two criminal complaints against journalist Mauricio Herrera Ulloa in the Costa Rican courts for the crimes of defamation, calumny and publication of offenses, based on the publication of the afore-mentioned articles (supra paragraphs 95(d), 95(e),

95(f), and 95(i)). One of the criminal complaints was filed in connection with the first set of articles, which appeared on May 19, 20 and 21, 1995; the other was filed in connection with one of the articles from the second series, specifically the one published on December 13, 1995. In addition to the criminal complaints, Mr. Félix Przedborski also filed a civil suit seeking damages from Mauricio Herrera Ulloa and the newspaper "La Nación" [FN51].

[FN51] Judgment Number 61-98 of May 29, 1998, of the Criminal Court of the First Judicial Circuit of San José, Group Three, San José (file of annexes to the application, volume I, annex 7, folio 810).

95(q) On May 29, 1998, the Criminal Court of the First Judicial Circuit of San José delivered a verdict acquitting Mr. Mauricio Herrera Ulloa on the grounds that he had not acted with the malice that must be present for the actions to constitute the crimes of defamation, calumny and propagating or publishing offenses. The judgment stated that Mr. Herrera Ulloa's actions were not carried out in the "spirit of malice or […] purely out of a desire to give offense; instead, he acted out of his duty to report questions being raised abroad concerning a Costa Rican public official." [FN52] The judgment also dismissed the civil suit brought against the journalist and the newspaper "La Nación." [FN53]

[FN52] Judgment Number 61-98 of May 29, 1998, of the Criminal Court of the First Judicial Circuit of San José, Group Three, San José (file of annexes to the application, volume I, annex 7, final observations on the facts and the law, point seven, folio 892).
[FN53] Judgment Number 61-98 of May 29, 1998, of the Criminal Court of the First Judicial Circuit of San José, Group Three, San José (file of annexes to the application, volume I, annex 7, Chapter XI on the civil suit for damages and costs, folio 894).

95(r) The attorney for Mr. Przedborski filed a writ of cassation with the Third Chamber of the Costa Rican Supreme Court challenging the May 29, 1998 judgment (supra para. 95(q)) on the grounds of "procedural error," "failure to establish a rational bases," and "judicial error." [FN54]

[FN54] Judgment No. 000540-99 of May 7, 1999, of the Third Chamber of the Costa Rican Supreme Court (file on preliminary objections and possible merits, reparations and costs, volume I, annex g to the written brief of pleadings, motions and evidence of the alleged victims' representatives, folios 349 and 350 to 352).

95(s) On May 7, 1999, the Third Chamber of the Costa Rican Supreme Court, composed of Daniel González Álvarez (President), Mario Alberto Houed Vega, Alfonso Chaves Ramírez, Rodrigo Castro Monge and Carlos Luis Redondo Gutiérrez (alternate justice), delivered a judgment wherein it decided the writ of cassation filed by the attorney for Mr. Félix Przedborski challenging the May 29, 1998 judgment. The Third Chamber of the Costa Rican Supreme Court

nullified the verdict being challenged because "the court from which the case was removed […] took the analysis […] in a direction other than the one required for a proper inquiry into the existence or non-existence of the facts of the criminal complaint, particularly regarding such a fundamental question as what did defendant Mauricio Herrera Ulloa know and what was his intent [.] […T]he bases of the judgment are not sufficient to reasonably discard the presence of actual or possible malice (with regard to the crimes charged)." [FN55]

[FN55] Judgment No. 000540-99 of May 7, 1999, of the Third Chamber of the Supreme Court of Justice of Costa Rica (file on preliminary objections and possible merits, reparations and costs, volume I, annex g) to the written brief of pleadings, motions and evidence of the alleged victims' representatives, folio 354).

95(t) On November 12, 1999, the Criminal Court of the First Judicial Circuit of San José delivered a verdict convicting Mr. Mauricio Herrera Ulloa and declared that the articles of May 19, 20 and 21, and of December 13, 1995 "were written and published fully mindful of the offensive nature of their content and for the sole purpose of dishonoring and besmirching the reputation of Mr. Félix Przedborski." His was convicted on four counts of the crime of publishing offenses constituting defamation under Article 152 in relation to Article 146 of the Costa Rican Penal Code; the court further held that the defense of justification (exceptio veritatis) was dismissed. The court sentenced Mr. Mauricio Herrera Ulloa to a forty-day fine for each crime, at ¢2,500.00 (two thousand five hundred colones) per day, for a total of 160 days in fines. In application of the rule of concurso material (where a number of related crimes are combined to reduce the penalty that would have been required had each separate crime carried its own weight), "the fine [wa]s reduced to be three times the maximum per count"; in other words, the fine was reduced from 160 to 120 days, for a total of ¢300,000.00 (three hundred thousand colones). The Criminal Court of the First Judicial Circuit of San José also ordered Mr. Mauricio Herrera Ulloa to publish the "Now Therefore" portion of the conviction in the newspaper "La Nación", in the section called "El País", in the very same print face used in the impugned articles." [FN56]

[FN56] Judgment Number 1320-99 of November 12, 1999, of the Criminal Court of the First Judicial Circuit of San José, Group Three, San José (file of annexes to the application, volume II, annex 8, "Now, Therefore" of the Judgment, folios 920 and 1216 to 1218).

95(u) The November 12, 1999 conviction (supra para. 95 (t)) upheld the suit for damages, sentencing Mr. Mauricio Herrera Ulloa as a writer for the newspaper "La Nación" and the newspaper itself "for publishing defamatory articles." The court held them to be jointly and severally liable and ordered them to pay ¢60,000,000.00 (sixty million colones) for the moral damage caused by the articles that appeared in "La Nación" on May 19, 20, 21, and December 13, 1995. In the case of "La Nación," the court ordered that it take down the "link" at the La Nación Digital website on the internet between the surname Przedborski and the impugned articles; it ordered the newspaper to establish a "link" at La Nación Digital between the articles

in question and the operative part of the judgment. Finally, the Costa Rican court ordered Mauricio Herrera Ulloa and "La Nación" to pay court costs in the amount of ¢1,000.00 (one thousand colones) and personal damages in the amount of ¢3,810,000.00 (three million eight hundred ten thousand colones). [FN57]

[FN57] Judgment Number 1320-99 of November 12, 1999, of the Criminal Court of the First Judicial Circuit of San José, Group Three, San José (file of annexes to the application, volume II, annex 8, "Now, Therefore" of the Judgment, folios 1214 and 1217).

95(v) In the wake of the criminal and civil judgment that the Criminal Court of the First Judicial Circuit of San José handed down against him on November 12, 1999, Mr. Mauricio Herrera Ulloa abstained from publishing any further information regarding Mr. Félix Przedborski. [FN58]

[FN58] Cf. testimony of Mauricio Herrera Ulloa given before the Inter-American Court of Human Rights at the public hearing held on April 30, 2004; official translation of the German book titled "Jürgen Roth" (The Eminence Gris) by Hoffmann and Campe (file of evidence presented during the public hearing held on April 30 and May 1, 2004, single volume, folios 3468- 3510).

95(w) On December 3, 1999, the defense attorney representing Mauricio Herrera Ulloa and the special legal counsel representing Herrera Ulloa and the newspaper "La Nación" filed a writ of cassation with the Criminal Trial Court of the First Judicial Circuit of San José seeking nullification of the November 12, 1999 conviction (supra para. 95(t)) on the grounds of, inter alia, defects in the reasoning of the judgment due to violation of the rules governing reasoned judgment arrived at freely and on the basis of admissible evidence. In that writ, the court was asked to nullify the judgment and to acquit the accused. [FN59] Mr. Mauricio Herrera Ulloa, "together with Mr. Fernán Vargas Rohrmoser, as agent for La Nación", also filed a writ of cassation separate from the one filed by Mr. Herrera Ulloa's defense attorney and claiming, inter alia, "nonobservance of the rules of logical inference" and "lack of correspondence between charge and judgment." [FN60]

[FN59] Cf. writ of cassation filed by Mr. Fernando Lincoln Guier Esquivel (file of annexes to the application presented by the Inter-American Commission on Human Rights, volumes II-III, annex 12, folios 1248-1393); and January 24, 2001 ruling on the writs of cassation. Third Chamber of the Costa Rican Supreme Court, San José (file of annexes to the application, volume III, annex 12, folio 1397).

[FN60] January 24, 2001 ruling on the writs of cassation. Third Chamber of the Costa Rican Supreme Court, San José (file of annexes to the application, volume III, annex 12, folios 1396-1399).

95(x) On January 24, 2001, the Third Chamber of the Costa Rican Supreme Court, composed of Daniel González Alvarez (President), Mario Alberto Houed Vega, Alfonso Chaves Ramírez, Rodrigo Castro Monge and Carlos Luis Redondo Gutiérrez (alternate justice), dismissed the writs of cassation filed by the defense attorney for the personal charged in the criminal complaint and the special legal counsel for the newspaper "La Nación", and by Mr. Mauricio Herrera Ulloa and Mr. Fernán Vargas Rohrmoser, respectively (supra para. 95(w)) With the dismissal of those writs, the November 12, 1999 conviction became final (supra para. 95(t)). [FN61]

[FN61] January 24, 2001 ruling on the writs of cassation. Third Chamber of the Costa Rican Supreme Court, San José (file of annexes to the application, volume III, annex 12, folios 1395-1424).

95(y) The Third Chamber of the Costa Rican Supreme Court that dismissed the two writs (supra para. 95(x)) was composed of the same justices who decided the writ of cassation filed by the attorney for Mr. Félix Przedborski in a decision dated May 7, 1999 (supra para. 95(s)) and ordered nullification of the May 29, 1998 verdict of acquittal [FN62] (supra para. 95(q)).

[FN62] Judgment No. 000540-99 of May 7, 1999 of the Third Chamber of the Costa Rican Supreme Court (file on preliminary objections and possible merits, reparations and costs, volume I, annex g to the written brief of pleadings, motions and evidence of the alleged victims' representatives, folio 349); and January 24, 2001 ruling on the writs of cassation. Third Chamber of the Costa Rican Supreme Court, San José (file of annexes to the application, volume III, annex 12, folio 1395).

95(z) On February 21, 2001, the Criminal Trial Court of the First Judicial Circuit of San José ordered enforcement of the November 12, 1999 conviction, which had become final (supra para. 95.t). [FN63]

[FN63] Cf. February 1, 2001 order for enforcement of judgment, delivered by the Criminal Trial Court of the First Judicial Circuit of San José (file of annexes to the application, volume III, annex 12, folio 1425).

95(aa) On April 3, 2001, the Criminal Court of the First Judicial Circuit of San José issued an order wherein it dismissed the appeal that the defense attorney for Mr. Mauricio Herrera Ulloa and the special counsel for the newspaper "La Nación" had filed seeking simultaneous revocation and nullification; the court ruled for dismissal "inasmuch as the verdict being challenged [...] was properly substantiated." In that same decision, Mr. Mauricio Herrera Ulloa was ordered to issue the "publication contained and ordered in the final judgment;" the newspaper "La Nación", represented by Mr. Fernán Vargas Rohrmoser, was ordered to "remove

information relating to the case from the La Nación Digital website on the internet." The Court also warned Mssrs. Herrera Ulloa and Vargas Rohrmoser that if they failed to comply they could be committing the crime of contempt of authority, provided for in Article 307 of the Penal Code, [FN64] the penalty for which is imprisonment for fifteen days to one year. [FN65]

[FN64] Cf. April 3, 2001 decision of the Criminal Trial Court of the First Judicial Circuit of San José (file on provisional measures in the "La Nación" case, volume I, folio 96).
[FN65] Costa Rican Penal Code (file on preliminary objections and possible merits, reparations and costs, annex A) to the written brief of pleadings, motions and evidence of the alleged victims' representatives).

95(bb) On April 24, 2001, the Criminal Trial Court of the First Judicial Circuit of San José delivered an order in which it ordered a "stay of enforcement of the judgment [of November 12, 1999] and of the decisions that followed from it." [FN66]

[FN66] Cf. April 24, 2001 order to stay enforcement of the November 12, 1999 judgment of conviction delivered by the Criminal Trial Court of the First Judicial Circuit of San José (file on provisional measures in the "La Nación" case, volume I, folio 99).

95(cc) To date, Mr. Mauricio Herrera Ulloa has not made any payment related to enforcement of the judgment delivered against him. [FN67] "La Nación", through its legal representative Mr. Fernán Vargas Rohrmoser, made a court-ordered deposit in the amount of ¢60,000,000.00 (sixty million colones). [FN68]

[FN67] Cf. testimony of Mr. Mauricio Herrera Ulloa before the Inter-American Court of Human Rights at the public hearing on April 30, 2004.
[FN68] Cf. testimony of Mr. Fernán Vargas Rohrmoser before the Inter-American Court of Human Rights at the public hearing on April 30, 2004.

With regard to Mr. Herrera Ulloa's listing in the Judiciary's Record of Convicted Felons

95(dd) As a result of the conviction, Mr. Mauricio Herrera Ulloa's name was entered into the Judiciary's Record of Convicted Felons on March 1, 2001 [FN69] (supra para. 95(t)), pursuant to the Law on the Judiciary's Record and Archives No. 6723 of March 10, 1982. Article 7 of that law provides that "Regardless of whether the trial court has stayed enforcement of the judgment, once the verdict is final it shall send a summary of the verdict to be entered into the Judiciary's Record." [FN70] Article 5 of that law states a summary of any crime committed with mens rea or intent shall be entered into the Judiciary's Record. [FN71]

[FN69] Cf. communication from the Head of the Department of the Judiciary's Records and Archives, dated August 29, 2001 (file on provisional measures in the "La Nación" case, volume II, annex 1 to the State's Report of August 31, 2001, folio 422).
[FN70] Cf. Law on the Judiciary's Record and Archives No. 6723 (file on provisional measures in the "La Nación" case, volume I, annex 1 to the State's report of August 16, 2001, folio 237).
[FN71] Cf. Law on the Judiciary's Record and Archives Nº 6723 (file on provisional measures in the "La Nación" case, volume I, annex 1 to the State's report of August 16, 2001, folio 236).

95(ee) Article 12 of the Law on the Judiciary's Record and Archives No. 6723, provides that "entries in the record" may only be nullified or amended by order of the sentencing court, or when a judgment delivered on an appeal for review so orders. [FN72]

[FN72] Cf. Law on the Judiciary's Record and Archives Nº 6723 (file on provisional measures in the "La Nación" case, volume I, annex 1 to the State's Report of August 16, 2001, folio 236).

95(ff) On April 26, 2001, the State entered a "notation [...] in the margin by the entry for the conviction, noting that enforcement of the judgment had been stayed." [FN73]

[FN73] Cf. The State's Report of August 31, 2001 (file on provisional measures in the "La Nación" case, volume II, folio 417); communication from the Head of the Department of the Judiciary's Record and Archives, August 29, 2001 (file on provisional measures in the "La Nación" case, volume II, annex 1 to the State's Report of August 31, 2001, folio 422).

95(gg) On August 13, 2001, the Office of the Executive Director of the Judiciary's Record of Convicted Felons issued a certificate to the effect that no notations had been entered in the name of Mr. Mauricio Herrera Ulloa [FN74] and then the following day issued another in which he mentioned the notations on the November 12, 1999 criminal conviction. [FN75]

[FN74] Cf. Certification from the Judiciary's Record of Convicted Felons, August 13, 2001 (file on provisional measures in the "La Nación" case, volume II, annex to the Commission's comments on the State's Report of August 16, 2001, folio 404).
[FN75] Cf. Certification from the Judiciary's Record of Convicted Felons, August 14, 2001 (file on provisional measures in the "La Nación" case volume II, annex 6 to the State's Report of August 16, 2001, folio 351).

95(hh) On October 3, 2001, the Criminal Trial Court of the First Judicial Circuit of San José issued an order whereby it ordered that the "stay of enforcement of the judgment delivered against Mr. Mauricio Herrera Ulloa shall stand until such time as the Inter-American Court of Human Rights decides" the case once and for all. [FN76]

[FN76] Cf. October 5, 2001 communication from the Criminal Trial Court of the First Judicial Circuit of San José (file on provisional measures in the "La Nación" case, volume II, annex to the State's Report of October 5, 2001, folio 458).

95(ii) On December 4, 2001, the Department of the Judiciary's Record and Archives acknowledged that the uncertainty to which Mr. Mauricio Herrera Ulloa had been exposed would not happen again under any circumstances, [FN77] and issued a certification to the effect that Mr. Herrera Ulloa's name was not listed in the Judiciary's Record. [FN78]

[FN77] Cf. the State's December 4, 2001 observations on the November 30, 2001 brief filed by the Inter-American Commission on Human Rights (file on provisional measures in the "La Nación" case, volume II, folio 475).

[FN78] Cf. Certification from the Office of the Judiciary's Record of Convicted Felons, dated December 4, 2001 (file on provisional measures in the "La Nación" case, volume II, annex to the State's December 4, 2001 observations on the November 30, 2001 brief filed by the Inter-American Commission on Human Rights, folio 477).

95(jj) Article 13 of the Law on the Judiciary's Record and Archives states that the information contained in the Record shall be accessible. Article 20 of that law provides that the files and documents in the record may be reviewed by, inter alia, law students and other persons for research purposes, when those purposes are duly authorized." [FN79]

[FN79] Cf. Law on the Judiciary's Record and Archives Nº 6723 (file on provisional measures in the "La Nación" case, volume I, annex 1 to the State's Report of August 16, 2001, folios 237-239).

With regard to crimes against honor under the Costa Rican Penal Code

95(kk) On November 30, 1998, the Executive Branch of the Costa Rican government introduced a bill in Costa Rica's Legislative Assembly for Protection of Freedom of the Press. [FN80] On April 22, 2004, the Legislative Assembly's Committee on the Press issued a report on the Bill on Freedom of Expression and the Press, which suggested amendment of, inter alia, articles 147 (crime of calumny), 151 (exclusion of the crime) and 155 (publication as a gesture of satisfaction) of the Costa Rican Penal Code, repeal of Article 149 (proof of truth) of the Code, amendment of articles 204 (duty to testify) and 380 (criminal complaint and transfer) of the Code of Criminal Procedure, repeal of Article 7 of Print Law No. 32 of July 12, 1902, and inclusion of the "conscience clause." [FN81]

[FN80] Cf. recitals of the bill for the Protection of Freedom of the Press (file of documents supplied by the Inter-American Commission on Human Rights and the State at the public hearing on May 22, 2001 on the request for provisional measures in the "La Nación" case, annex 4). In this document, the State observed that "the actual legal regulation […] constitutes a sword of Damocles hanging dangerously over journalists and posing a threat to their autonomy and integrity in the unfettered practice of their profession, and is in reality a mechanism of prior censorship."
[FN81] Cf. Draft bill of the Law on Freedom of Express and of the Press of the Legislative Assembly's Press Committee, April 22, 2004 (file of evidence presented during the public hearing held on April 30 and May 1, 2004, single volume, folios 3462-3465); and document titled "The Costa Rican Government's Position at the hearing of the Inter-American Commission on Human Rights on case 12,367, Mauricio Herrera and La Nación," May 4, 2001 (file of annexes to the application, volume II, annex 10, folio 1220-1225).

With regard to provisional measures

95(ll) The State complied with the provisional measures ordered by the Inter-American Court of Human Rights on September 7, 2001. [FN82]

[FN82] Cf. Comments from the representatives of Mr. Mauricio Herrera Ulloa, the beneficiary of the provisional measures, on the letter rogatory from the Criminal Court of the First Judicial Circuit of San José of November 20, 2002 (file on provisional measures in the "La Nación" case, volume II, annex to the observations of the Inter-American Commission on Human Rights to the State's brief of December 4, 2002, folio 603).

Consequence of Mr. Mauricio Herrera Ulloa's actions

95(mm) The events in the instant case altered Mr. Mauricio Herrera Ulloa's professional, personal and family circumstances and had an inhibiting effect on his exercise of the right to free speech in the practice of his profession. [FN83]

[FN83] Cf. testimony of Mr. Mauricio Herrera Ulloa given before the Inter-American Court of Human Rights during the public hearing held on April 30, 2004; sworn testimony of Mrs. Laura Mariela González Picado given in the presence of a public civil servant on March 11, 2004 (file on preliminary objections and possible merits, reparations and costs, volume III, folios 1107-1108); and official translation of the German book titled "Jürgen Roth" (The Eminence Gris) by Hoffmann and Campe (file of evidence presented during the public hearing held on April 30 and May 1, 2004, single volume, folios 3468-3510).

With regard to the representations of Mr. Mauricio Herrera Ulloa and Mr. Fernán Vargas Rohrmoser before the domestic courts and before the inter-American system for the protection of human rights and their representation expenses

95(nn) Mr. Mauricio Herrera Ulloa and Mr. Fernán Vargas Rohrmoser were represented by Mssrs. Fernando Guier Esquivel, Pedro Nikken and Carlos Ayala Corao, who declined to claim any costs in the form of professional fees in the instant case, for the professional assistance they provided in the proceedings in this case before the domestic courts and before the inter-American system for the protection of human rights. They submitted a number of documents pertaining to expenses for travel, lodging, telephone and meals that they incurred as a consequence of the trips they made to Washington and to San José. [FN84]

[FN84] Cf. brief of pleadings, motions and evidence filed by the alleged victims' representatives (file on preliminary objections and possible merits, reparations and costs, volume I, folio 323); receipts Nos. 132832 and 132983 from Viajes y Turismo Halcón (file on preliminary objections and possible merits, reparations and costs, volume V, annexes 5 and 6 to the final written pleadings of the alleged victims' representatives, folio 1643 and 1645); and receipts for lodging, food, telephone calls and airline tickets (file on preliminary objections and possible merits, reparations and costs, volume I, annex M) to the written brief of pleadings, motions and evidence filed by the alleged victims' representatives, folios 383 to 405).

IX. PRELIMINARY CONSIDERATIONS

96. Before entering into its examination of the merits of the instant case, the Court believes some reference should be made to the victim status being claimed for Mr. Fernán Vargas Rohrmoser.

97. In its application and in its final written pleadings, the Inter-American Commission alleged that Mr. Fernán Vargas Rohrmoser was himself a victim inasmuch as the State had violated the Convention by demanding, in its April 3, 2001 court order, that he comply with the criminal conviction judgment that went against Mr. Mauricio Herrera Ulloa (supra para. 95(aa)). The representatives of the alleged victims made the same point in their brief of pleadings, motions and evidence and in their final written pleadings.

98. In its brief on preliminary objections, its brief answering the application, and its comments on the written brief containing pleadings, motions and evidence, (supra para. 33) the State claimed that Mr. Vargas Rohrmoser ought not to be part of the litigation, as he was not a victim.

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99. The Court must point out that it is a proven fact (supra para. 95(t)) that in a judgment the Criminal Trial Court of the First Judicial Circuit of San José delivered on November 12, 1999, Mr. Mauricio Herrera Ulloa was convicted of having committed the crime of publishing offenses

constituting defamation. As a consequence of this judgment, under the civil suit for damages Mr. Mauricio Herrera Ulloa and the newspaper "La Nación" S.A., represented by Mr. Fernán Vargas Rohrmoser, were declared jointly and severally liable in that suit.

100. The civil consequences of the criminal conviction that fell directly upon Mr. Fernán Vargas Rohrmoser were in his capacity as "La Nación's" legal representative, as it was through this vehicle of the mass media that journalist Mauricio Herrera Ulloa exercised his right to freedom of expression. Hence, the subsidiary civil penalties established in the criminal judgment are directed against the newspaper "La Nación" S.A., whose legal representative vis-à-vis third parties is Mr. Vargas Rohrmoser. Those penalties were not targeted at Mr. Vargas Rohrmoser as a private subject or individual.

X. VIOLATION OF ARTICLE 13 IN RELATION TO ARTICLES 1(1) AND 2 (FREDOM OF THOUGHT AND EXPRESSION)

Pleadings of the Commission

101. With regard to Article 13 of the Convention, the Commission argued the following:

101(1) With regard to the scope of the right to freedom of thought and expression and its role within a democratic society:

a) Article 13 has two dimensions: the individual, which is realized through the right to express thoughts and ideas and the right to receive them; and the social dimension, a means to share ideas and information for mass communication among human beings. Both dimensions must be guaranteed simultaneously. The articles written by journalist Mauricio Herrera Ulloa involved both dimensions of freedom of expression;
b) any restrictions on freedom of expression must be intended to serve some pressing social need. When faced with a number of alternatives, the one chosen must be the one least restrictive of the protected right; furthermore, the restriction must be proportionate to the interest that justifies it; and
c) it is not enough for a restriction of a Convention-protected right to be useful to obtaining some legitimate end; rather, "it must be necessary, which means that it must be shown that it cannot reasonably be achieved through a means less restrictive."

101(2) With regard to the alleged violation of Article 13 represented by the conviction under criminal law and by the fact that Mr. Mauricio Herrera Ulloa was found guilty on four counts of the crime of publishing offenses constituting defamation, the Commission wrote that:

a) When it imposed criminal penalties on Mr. Mauricio Herrera Ulloa in order to protect the honor and reputation of Mr. Przedborski, Costa Rica's honorary consul, the State caused a chilling effect on freedom of expression, silencing the publication of news on matters of public interest that involve public officials. This is not the protection of reputation and honor of which Article 11 of the Convention speaks;
b) the criminal laws on defamation, calumny and insult in Costa Rica serve a legitimate purpose; however, Article 13 of the Convention is violated when conduct involving public issues

is penalized, as there is no pressing social need that justifies the criminal penalty. Enforcement of domestic privacy laws must conform to international standards, which require a proper balance between protection of privacy and honor and protection of freedom of expression;

c) the State must abstain from censoring information regarding actions carried out by public officials or by private individuals voluntarily involved in public affairs when those actions are a matter of public interest. Such figures are expected to show greater tolerance for criticism, which implies that the degree of protection of privacy and reputation that public figures enjoy is not the same as the private citizen's;

d) Mr. Mauricio Herrera Ulloa provoked public debate about Mr. Przedborski, but the liabilities that the State subsequently imposed on him go well beyond the limits of Article 13(2) of the Convention;

e) the criminal laws on defamation, offense and calumny were used to silence criticism of a public official and to censor the publication of articles related to his alleged illicit activities while in office, which is a violation of the Convention;

f) the articles published in the European press concerning the alleged illicit activities of Costa Rica's honorary consul, Mr. Przedborski, are of great public interest both in Costa Rica and in the international community;

g) the standard the State applied in Mr. Herrera Ulloa's conviction under Article 152 of the Penal Code, which criminalizes defamation, was based on objective rather than subjective honor; applying that standard, it criminally penalized someone who did "not take proper care to refrain [from publishing] when one is unsure whether the facts are correct." This standard is an impediment to the free flow of ideas and opinions and flies in the face of international jurisprudence;

h) "[f]reedom of expression is one of the most effective ways of denouncing and corroborating, through debate and a broad exchange of information and ideas, alleged acts of corruption attributable to State entities and State officials;"

i) the State failed to prove the presence of a pressing social need that would justify the restriction on freedom of expression that the criminal case and conviction implied;

j) the criminal prosecution and punishment applied to Mr. Mauricio Herrera Ulloa as supposedly subsequent liability, were in no sense proportionate to any legitimate State interest; the use of the State's ultimate restraint mechanism, i.e., criminal prosecution and punishment, was not justified, particularly when there were other alternatives to achieve the aim sought;

k) criminal punishments for making certain statements could, in some cases, even be regarded as indirect methods of curtailing freedom of expression;

l) Costa Rica's criminal defamation law violates Article 13 of the Convention because it allows the defense of justification (exceptio veritatis) only in certain circumstances and requires that the respondent prove the truth of his statements;

m) by violating Article 13 of the Convention to the detriment of Mr. Mauricio Herrera Ulloa and Mr. Fernán Vargas Rohrmoser, the State has failed to comply with the general duty to respect the rights and freedoms recognized in the Convention and to ensure their free and full exercise to all persons subject to its jurisdiction, as provided in Article 1(1) of the Convention; and

n) the State must adopt all measures necessary so that its own system of domestic laws gives full effect to the Convention's provisions, as Article 2 thereof requires.

101(3) With regard to the inclusion of Mauricio Herrera Ulloa's conviction in the Judiciary's Record of Convicted Felons, the Commission argued that:

a) in Costa Rica, "the existence of a conviction is sufficient in law for the convicted person's name to be entered into the Judiciary's Record of Convicted Felons." Once the judgment becomes final, registration in the Record of Convicted Felons is automatic and need not be ordered by the judge in the judgment. There is no effective remedy against listing in the Judiciary's Record of Convicted Felons save for recourse to the solutions under international human rights law;
b) in the instant case, the legal effect of entering Mr. Herrera Ulloa's name into the Judiciary's Record of Convicted Felons was to restrict the exercise of his fundamental rights with regard to obtaining: 1) entry into civil service; 2) a driver's license; 3) an application for a degree examination and admission; 4) a driver's insurance policy; 5) a pension; 6) the right to adopt minors; and 7) work in Costa Rica and abroad;
c) having his name listed as a convicted felon is detrimental to Mr. Herrera Ulloa's name, honor and reputation vis-à-vis his family and Costa Rican society as a whole, a situation exacerbated by the fact that many institutions and persons are authorized to request information from the Judiciary's Record of Convicted Felons; and
d) the inclusion of Mr. Mauricio Herrera Ulloa's name in the Judiciary's Record of Convicted Felons is also an unlawful mechanism for restricting freedom of expression and hence a violation of Article 13 of the American Convention.

101(4) With regard to the civil damages that both journalist Mauricio Herrera Ulloa and the newspaper "La Nación", represented by Mr. Vargas Rohrmoser, were ordered to pay, the Commission argued that:

a) making it a crime to reproduce published news reports concerning the conduct of a public official can have the effect of causing journalists to engage in self-censorship, which obstructs the free exchange and flow of information, ideas and opinions;
b) if it is disproportionate or fails to serve the pressing social need that would otherwise justify it, the subsequent liability imposed in a concrete case would be a clear violation of Article 13 of the American Convention;
c) legal actions brought by public officials or private persons voluntarily involved in public affairs, claiming defamation, calumny and insult, should be matters for civil –not criminal- courts, applying the standard of actual malice, where it is the alleged aggrieved party who must bear the burden of proving that the social communicator intended to inflict harm or acted with full knowledge that he was spreading false information;
d) Mr. Przedborski, Costa Rican honorary consul, had an influential role representing Costa Rican society abroad, so that Costa Rica's citizens had a "substantial and legitimate interest" in knowing how he comported himself in performing his functions; and
e) inasmuch as Costa Rica has offered no convincing arguments to show that there was manifest mens rea in the publication of the various disputed articles, no criminal or civil liabilities can be imposed on Mr. Mauricio Herrera Ulloa as the author of those allegedly prejudicial articles, or on the newspaper business that ran the articles, or on Mr. Vargas Rohrmoser as the newspaper's legal representative. Consequently, the civil damages ordered as a result of the criminal action are also a violation of Article 13 of the American Convention.

101(5) With regard to the order to take down the existing link at the "La Nación Digital" website between the surname Przedborski and Mr. Mauricio Herrera Ulloa's articles that were the cause of the criminal complaint and civil suit, and the order to establish a link between those articles and the "Now, Therefore" portion of the judgment of conviction, the Commission argued that:

a) the order to eliminate the existing link constitutes interference and a form of prior censorship of the news by the State, in violation of Article 13 of the Convention. The order to create another link with the operative part of the guilty verdict is a restriction on freedom of expression, as it dictates what the content of the news is to be, which is not within the limitations permitted under Article 13 of the Convention;
b) the direct effect of the orders given in the judgment of conviction is one of prior censorship, which presupposes control and veto power over news before it is disseminated; thus, the individual whose expression has been censored and society as a whole are prevented from exercising their right to freedom of expression and information. The court orders also impair the journalist's right to impart information on issues of legitimate public interest that are available in the foreign press; and
c) the prohibition against prior censorship to protect the honor of a public official is absolute and not covered by any of the exceptions provided for in Article 13 of the Convention.

101(6) With regard to Mr. Fernán Vargas Rohrmoser's status as alleged victim inasmuch as he was directly affected by the enforcement of the court judgment, the Commission argued that:

a) Mr. Vargas Rohrmoser's status as an alleged victim is due to the fact that "he would have personally paid" the consequences of failing to comply with the order for enforcement of the judgment of conviction for defamation, and the fact that the penalties imposed were disproportionate and prohibited by the American Convention;
b) his status as an alleged victim is not lifted by the State's claim that if he failed to comply with the order for enforcement of the judgment ordering execution of judgment, Mr. Rohrmoser would not have served time in prison for the crime of contempt of authority; and
c) the warning given to Mr. Vargas Rohrmoser on April 3, 2001, to the effect that if he failed to comply with the judgment of conviction, he might be committing the crime of contempt of authority, is the factor that makes him an alleged victim.

Pleadings of the alleged victims' representatives

102. As for Article 13 of the Convention, the alleged victims' representatives argued the following:

102(1) On the subject of freedom of expression in a democratic society:

a) Article 13 of the American Convention has two dimensions: the individual and the social. Mauricio Herrera Ulloa's articles cut across both dimensions of freedom of expression;
b) freedom of expression is subject to certain legitimate limits. The exceptional nature of those limitations is evidenced in paragraph 2 of Article 13 of the American Convention.

Paragraph 3 of that article also prohibits restriction of this right by any indirect methods or means, which it enumerates, although not exhaustively;
c) even when motivated by public order or the general welfare, limitations on freedom of expression and on human rights in general, "cannot degenerate to the point that they end up draining those rights of all content." There is a classic conflict between freedom of expression and protection of privacy. However, the principle of proportionality must be strictly observed in this area, since otherwise freedom of expression could be weakened; and
d) the Commission has established that the right to freedom of expression and information is one of the principal mechanisms society has to exercise democratic control over persons charged with public affairs.

102(2) With regard to the alleged violation of Article 13 by the conviction under criminal law and by the fact that Mr. Mauricio Herrera Ulloa was found guilty on four counts of the crime of publishing offenses constituting defamation, the alleged victims' representatives pointed out that:

a) they fully concur with the Commission's contention that the Costa Rican courts' conviction of Mr. Herrera Ulloa constitutes a violation of his freedom of expression. The conviction does not fit either precondition established in Article 13(2) of the Convention for subsequent imposition of liability, one of which is protection of reputation; but this is not the protection of honor and reputation of which Article 11 of the Convention speaks;
b) the criminal law on defamation, calumny and offense, invoked to convict Mr. Mauricio Herrera Ulloa, is expressly contemplated in the legislation for protection of the honor, reputation and privacy of persons. However, to prosecute, convict and punish a person under criminal law, for conduct involving statements on issues of public interest is a violation of Article 13 of the Convention, as there is no pressing social need that justifies punishment under criminal law;
c) the State must refrain from censoring news of public interest that concerns the conduct of public officials or private citizens voluntarily engaged in public affairs, and must provide that information to its citizens;
d) because of the nature of their functions, public officials are subject to public scrutiny and must be more tolerant of criticism, which means that the degree of protection of privacy and reputation that they enjoy is different from that enjoyed by private citizens. Costa Rican journalists and the media could not turn a blind eye to the controversy reported in the Belgian press involving diplomat Przedborski, a public figure alleged to have been implicated in acts of corruption. Journalists and the media had a professional responsibility to inform the public about the controversy unleashed in the Belgian press surrounding that diplomat;
e) Mr. Herrera Ulloa, as a journalist, and "La Nación", as a newspaper, aroused public discussion about a public official, which is a pressing social need within a democratic society. The liabilities that the State subsequently imposed upon them overstep the boundaries of Article 13(2) of the Convention;
f) the penalty imposed prevents Mr. Mauricio Herrera Ulloa from freely circulating information on the activities of public officials, as he might face new criminal prosecution and conviction and be treated like a criminal;
g) the laws on criminal defamation, libel and slander were used to silence criticism of a public official and to censor the publication of articles related to the alleged illicit activities in which a public official engaged while discharging his office. Therefore, the effect of the penalty

imposed is, per se, essentially tantamount to those imposed under the desacato laws and, therefore, in violation of the Convention;

h) Mr. Przedborski did not have to prove journalist Mauricio Herrera Ulloa's mens rea. But because of the way in which the Costa Rican courts applied the principle of exceptio veritatis (defense of justification), the burden of proof was reversed and it was the journalist who had to prove the accuracy of what the Belgian newspapers had published in order to plead justification and qualify for the special grounds for acquittal allowed if he proves the truth of what he reported. The judgment that convicted Mr. Herrera Ulloa never established that he had acted with full knowledge that the accusations that the Belgian papers made about Mr. Przedborski were false; nor did it establish that he had acted with reckless disregard for the truth;

i) the European Court has held that within a democratic society, journalists need not prove the truth of opinions or value judgments regarding public figures;

j) Mauricio Herrera Ulloa and Costa Rican society have a right to participate in lively, strong and challenging debates on every aspect having to do with the normal and balanced workings of society. Articles 149 and 152 of the Costa Rican Penal Code, or the convictions being challenged here, punish discourse regarded as critical of a person in the public administration. They punish that discourse in the person of Mr. Mauricio Herrera Ulloa, the author. In so doing, they defy the very essence and substance of freedom of expression;

k) convicting Mauricio Herrera Ulloa of the crime of publishing offenses constituting defamation and punishing him for having published articles on a matter of public interest, is a restriction on his freedom of expression that is incompatible with the needs of a democratic society and serves no pressing social need;

l) the State violated Article 1(1) of the Convention, in relation to articles 13 and 8 thereof, to the detriment of Mauricio Herrera Ulloa and Fernán Vargas Rohrmoser; and

m) Article 2 of the Convention not only requires States parties to adopt new provisions of domestic law, but also to do away with any law or practice that is incompatible with the obligations they undertake as States parties to the Convention.

102(3) With regard to freedom of expression, the circulation of news from third sources and proof of truth, the representatives stated that:

a) the State's imposition of criminal penalties to protect the honor and reputation of Mr. Przedborski, Costa Rica's honorary consul, had a chilling effect on freedom of expression and on the publication of news on issues of public interest that involve public officials;

b) the convictions delivered against Mr. Herrera Ulloa were based on articles 152 and 149 of the Costa Rican Penal Code; they asserted that he had circulated news reproduced from the foreign press that had described Mr. Przedborski as being implicated in shady dealings. The verdicts also stated that Mr. Herrera Ulloa had merely demonstrated the existence of those foreign publications, but had failed to prove the accuracy of their news;

c) when the defense of justification (exceptio veritatis) is used to protect a person discharging public functions, the Convention is violated; this application of the defense of justification violates freedom of expression and the principle of presumption of innocence (Article 8(2) of the American Convention);

d) the right to "seek" information must be understood in its broadest sense. "It is entirely normal in the media business for a media outlet to repeat what other media outlets have reported; and it is especially normal for a given country's media to seek, find and impart news being

reported in the foreign press on issues related to their own country, even more so when that country's public officials are involved";
e) the Costa Rican laws are such that to avoid criminal prosecution and punishment, Costa Rican journalists may delay before reporting news circulated by a foreign medium or an international news agency, even when Costa Rican society has an obvious interest in getting that news. This self-censorship is incompatible with the concept of freedom of expression;
f) the way in which the Costa Rican courts applied the defense of justification (exceptio veritatis) in the instant case strikes at the function of journalists, who keep the public informed. The application of articles 149 and 152 of Costa Rica's Penal Code by the Third Chamber of the Costa Rican Supreme Court in the January 24, 2001 judgment has had the effect of "criminalizing reporting in a manner that has no place in a democratic society";
g) a law that, without requiring proof of bad faith on the journalist's part, makes it a crime for a journalist to publish news sourced to other foreign media outlets and containing alleged offenses against a Costa Rican public official, unless the journalist can prove that the information being reported is true, is in violation of Article 13(1) of the Convention. Therefore, a criminal conviction based on such a law is also a violation of Article 13(1) of the Convention; and
h) journalist Herrera Ulloa used as his sources four well-known Belgian newspapers; he contacted European newspapers to double-check the news; he tried to contact the diplomat in question, but to no avail; and he interviewed the foreign minister and deputy foreign minister, who confirmed that there were questions that needed to be answered.

102(4) With regard to the inclusion of Mauricio Herrera Ulloa's conviction in the Judiciary's Record of Convicted Felons, the alleged victims' representatives argued that:

a) in Costa Rica the existence of a conviction is sufficient in law for the convicted person's name to be entered into the Record of Convicted Felons. Once the judgment becomes final, registration in the Record of Convicted Felons is automatic and need not be ordered by the judge in the judgment. There is no effective remedy to prevent registration, except recourse to the solutions under international human rights law;
b) the legal effects of entering Mr. Herrera Ulloa's name into the Judiciary's Record of Convicted Felons was to restrict the exercise of his fundamental rights with regard to obtaining: 1) entry into civil service; 2) a driver's license; 3) an application for a degree examination and admission; 4) a driver's insurance policy; 5) pensions; 6) the right to adopt minors; and 7) work in Costa Rica and abroad;
c) an indirect effect of being registered in the Judiciary's Record of Convicted Felons is self-censorship, a restriction of freedom of expression in violation of Article 13(3) of the Convention; and
d) being registered in the Judiciary's Record of Convicted Felons exposes Mr. Herrera Ulloa to public censure and is thus prejudicial to his reputation; it also stigmatizes him in a way that prevents him from practicing his profession freely and damages his credibility.

102(5) With regard to the civil damages that both journalist Mauricio Herrera Ulloa and the newspaper "La Nación", represented by Mr. Vargas Rohrmoser, were ordered to pay, the representatives argued that:

a) the pecuniary penalties imposed in the November 12, 1999 judgment are a consequence of the criminal conviction; hence, had Mr. Herrera Ulloa not been found guilty of the punishable offense, there would have been no basis for the civil damages;
b) Mr. Przedborski had the option of either suing Mr. Herrera Ulloa for damages and injuries in civil court, or filing a criminal complaint. By opting for the second course of action, Mr. Przedborski, "of his own free will, staked the outcome of the civil damages suit" on the journalist's conviction in the criminal case; in so doing, he also staked the fate of the newspaper "La Nación", as jointly and severally liable, on the journalist's criminal conviction;
c) legal actions brought by public officials claiming defamation, calumny and insult, have no place in criminal courts; they are the purview of the civil courts, applying the principle of actual malice;
d) the factor "determining" the civil liability of Mr. Mauricio Herrera Ulloa and the newspaper "La Nación" is a punishable offense whose authorship was attributed to the journalist, not an autonomous civil wrong. Civil sanctions and criminal penalties have the same chilling effect on freedom of expression. That civil sanction is a violation of the freedom of expression guaranteed under Article 13 of the Convention, as no civil wrongdoing was committed; and because the penalty is disproportionate;
e) according to the doctrine of actual malice, publication of news on the activities of a public official that fall within the domain of public interest, can only lead to imposition of civil liability if it can be proved that it was made with malice, with full knowledge that the information being spread was false or with reckless disregard for whether it was true or false;
f) the general rule is that the accessory follows the fate of the principal; therefore, the civil damages ordered are a result of the criminal conviction; "both will be undone by the judgment that the Inter-American Court eventually delivers";
g) Article 1(2) of the Convention does not state, either directly or literally, that legal persons are always and necessarily precluded from the Convention's sphere of application. Every situation will have to be examined for the context in which the matter occurred in order to determine, in accordance with the object and purpose of the Convention, when the principal interest at stake involves the rights of a "human being," which is what the Convention recognizes;
h) in certain situations, violation of Convention-recognized rights also involves violation of legal persons' rights, or can only happen through the violation of the rights of certain legal persons; and
i) "La Nación" was held jointly and severally liable for the sole reasons that it is the business that owns the newspaper that published the convicted journalist's articles. That civil award is a violation of freedom of expression and is manifestly disproportionate in the instant case.

102(6) With regard to the order to take down the existing link at the "La Nación Digital" website between the surname Przedborski and Mr. Mauricio Herrera Ulloa's articles that were the cause of the criminal complaint and civil suit, and the order to establish a link between those articles and the "Now, Therefore" portion of the judgment of conviction, the alleged victims' representatives argued that:

a) the order to eliminate the link constitutes interference and a form of State censorship of the news, in violation of Article 13 of the Convention. The order to create another link with the

operative part of the guilty verdict is a restriction on freedom of expression, as it dictates what the content of the news will be, which is not within the limits permitted under Article 13 of the Convention; and

b) the direct effect of the orders given in the judgment of conviction is prior censorship, which presupposes control and veto power over news before it is disseminated; thus, the individual whose expression has been censored and society as a whole are prevented from exercising their right to freedom of expression and information. The orders also impair the journalist's right to impart information on issues of legitimate public interest that are available in the foreign press.

102(7) With regard to Mr. Fernán Vargas Rohrmoser's status as alleged victim inasmuch as he was directly affected by the enforcement of the court judgment, the alleged victims' representatives argued that:

a) the State violated the Convention when, in an April 3, 2001 order of the Criminal Court of the First Judicial Circuit of San José, it demanded that Mr. Fernán Vargas Rohrmoser comply with the order for enforcement of the judgment of conviction, expressly warning him that should he fail to comply, he might be deemed to have committed the crime of contempt of authority, provided for in Article 307 of the Costa Rican Penal Code and carrying a penalty of imprisonment. This demand is what made Mr. Vargas Rohrmoser an alleged victim; and

b) his status as an alleged victim is not lifted by the State's claim that if he failed to comply with the order for enforcement of the judgment ordering execution of judgment, Mr. Rohrmoser would not have served time in prison for the crime of contempt of authority.

Pleadings of the State

103. With regard to Article 13 of the Convention, the State asserted that:

a) the courts convicted Mr. Herrera Ulloa because the party filing the criminal complaint proved the defendant's mens rea. Moreover, democratic society is undermined as much by receiving untruthful information as it is by receiving no information at all;

b) the reputation of others is regarded per se as one of the few legitimate grounds for restricting freedom of expression and thought. Democratic society demands that the right to freedom of expression and the right to have one's honor respected be protected as equals. All the Convention-protected rights must be the frame of reference for any quest for balance. The right to honor is not a purely individual right;

c) criminalizing utterances, words or deeds that besmirch a person's honor or dignity does not, per se, trample freedom of expression. Costa Rica does not punish a person merely because he criticizes a public official. A person is punished when a trial, in which all the guarantees of due process are respected, proves that the reputation of a public official has been willfully and maliciously harmed;

d) moreover, "even when the guilty party has been convicted in criminal court and ordered to pay damages and the victim has been allowed to exercise his right of reply, in all likelihood that inkling of doubt as to the victim's good name will linger in the minds of his contemporaries and those of future generations;"

e) if the State fails to establish effective mechanisms to protect the honor of public officials, the public interest would be harmed and Costa Rica could hardly recruit the best people to serve in government;

f) Costa Rica's criminal laws strike a fair balance between freedom of expression and the right to have one's honor and reputation respected, since they only criminalize malicious conduct;

g) Costa Rica is convinced that it has adopted the necessary safeguards to guarantee the fundamental rights;

h) one must not sink to simplistic reductionism and pretend that the honor of a public servant is any less worthy of respect and protection than the honor of an ordinary private citizen. Such a distinction is an attack upon the principle of equality;

i) the policy on crime has determined that the best way to protect honor against attack is through criminal sanctions. The principles of sovereignty and self-determination dictate that the American Convention cannot force a given course of action upon the mechanisms of the inter-American system;

j) if the conviction induces self-censorship, then Article 13(2) of the American Convention would have the same effect because it allows subsequent imposition of liability;

k) it is evident that the representatives have a profound misunderstanding of the principle of exceptio veritatis. This principle is an exculpatory circumstance; by the time it comes into play, it has already been established that the defendant's conduct fits the crime, is unlawful and answerable. Therefore, it does not relieve the party filing the criminal complaint of his obligation to prove mens rea in the defendant's conduct;

l) if in the exercise of one's freedom of expression and thought, one says something that is not true, then one must be subject to subsequent imposition of criminal or civil liability. Mr. Herrera Ulloa was not convicted because he failed to prove the accuracy of the news reported in the European press; instead, he was convicted for having acted with mens rea by spreading news that defamed and offended the honor of the party filing the criminal complaint;

m) "[i]t was the interested party himself […who] spread the news that his name had been entered into the Judiciary's Record of Convicted Felons. The public, which might have lavished Mr. Herrera with credibility, respect and dignity, would likely have never learned of his registration had he not taken it upon himself to announce it to the public." "The interested party and the newspaper for which he works drummed up the publicity themselves";

n) entering Mr. Herrera Ulloa's name into the Judiciary's Record of Convicted Felons does not create any serious restrictions in the seven areas singled out by the Commission. And the fact that authorized institutions have access to and know of the Record and its entries does nothing to limit anyone's social, professional and personal life. Furthermore, the listing of Mr. Herrera Ulloa's conviction was stayed by the provisional measures ordered by the Inter-American Court;

o) if Mr. Mauricio Herrera Ulloa's honor was impugned in any way, it would only have been for the period during which his name was listed in the Judiciary's Record of Convicted Felons;

p) Mr. Mauricio Herrera Ulloa's purported hesitation about reporting news involving the activities of public officials is a "myth," as shown by the "countless" op-ed pieces and news articles supplied;

q) under the doctrine of actual malice, utterances, words or deeds that offend honor can be made punishable offenses. Indeed, other kinds of penalties for such conduct are compatible with a democratic society, provided their purpose is to protect honor and reputation;

r) the "assertion that a civil award ordered in the course of a criminal case is subordinate to the judgment in the criminal case, and follows virtually automatically from the decision in the principal (criminal) case, as a consequence of it and in addition thereto" is incorrect. The party filing the criminal complaint must prove both the existence of the crime and the extent and existence of the harm caused.The civil action preserves its own autonomy within the criminal case; the parties are responsible for moving the proceedings forward, as there is no ex officio procedural impetus. The civil action is a private action that can be waived; it is negotiable, compensable and can be abandoned;

s) surely the Court would never consider that the Convention's protection also extends to a legal person, represented by its chief legal counsel. "La Nación" has not the slightest right to claim protection not just belatedly but also improperly." Legal persons do not enjoy the same rights that human persons enjoy. Persons associated with "La Nación" are the only ones who could demand protection, yet not one of them "acted promptly to seek protection of his rights";

t) Mr. Vargas Rohrmoser cannot be counted among the victims of the violations alleged to be the result of the case prosecuted against Mr. Mauricio Herrera Ulloa, as Mr. Vargas Rohrmoser was not a party to that process;

u) the proposal put forward by the representatives and the Commission at the public hearing, which was to eliminate penalties for crimes against honor in the case of public officials or private persons involved in public affairs, clashes with one of the essential pillars of the rule of law, which is the prohibition of discrimination. With that kind of scheme to eliminate such penalties, the honor of public officials would be less protected by virtue of the fact that they have exercised their own political rights. Article 24 of the Convention prohibits arbitrary discrimination by proclaiming that all persons are equal before the law; and

v) public debate can be "heated or hurtful," but in the end it is still debate; in other words, it is a coming together of opinions, ideas or perceptions. However, the use of editorial space or articles in newspapers when no opportunity for reply or rebuttal is given, ought not to be confused with public debate. Nor should the public official under attack have to remain impervious to accusations or suspicions, no matter how unfounded they may be.

Considerations of the Court

104. Article 13 of the American Convention provides, inter alia, that:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

   a. respect for the rights or reputations of others; or

   b. the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

[…]

105. The case sub judice concerns the prosecution, conviction and criminal penalty imposed on journalist Mauricio Herrera Ulloa and the civil liability imposed on him and on Mr. Fernán Vargas Rohrmoser, legal representative of the newspaper "La Nación," for having published several articles that partially reproduced news reports that originally appeared in a number of European newspapers concerning the alleged illicit activities of Mr. Félix Przedborski. At the time the articles appeared, Mr. Przedborski was Costa Rica's representative to the International Atomic Energy Agency, headquartered in Austria, as honorary consul. Four of the articles published in "La Nación" were the subject of two criminal complaints brought by Mr. Przedborski (supra para. 95.p), which ended in a conviction. The judgment found Mr. Herrera Ulloa guilty on four counts of publishing offenses constituting defamation." The conviction carried with it the respective criminal and civil consequences. The judgment also held the newspaper "La Nación" jointly and severally liable.

106. Based on the proven facts in the instant case, the Court must determine whether Costa Rica unduly restricted journalist Mauricio Herrera Ulloa's right to freedom of expression by his criminal prosecution and the criminal and civil penalties imposed. The Court will not look at the question of whether the published articles constitute a given crime under Costa Rican law; instead, it will examine whether, through Mr. Mauricio Herrera Ulloa's criminal conviction (and its consequences) and the civil penalty imposed, the State violated or restricted the right to freedom of thought and expression protected under Article 13 of the Convention.

107. The Court will proceed to analyze this article in the following order: 1) content of the right to freedom of thought and expression; 2) freedom of thought and expression in a democratic society; 3) the role of the mass media and journalism in relation to freedom of thought and expression, and 4) permissible restrictions on freedom of thought and expression in a democratic society.

1) The content of the right to freedom of thought and expression

108. In relation to the content of the right to freedom of thought and expression, the Court has indicated previously that those who are protected by the Convention have not only the right and freedom to express their thoughts, but also the right and freedom to seek, receive and disseminate information and ideas of all kinds. Consequently, freedom of expression has an individual dimension and a social dimension:

It requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others. [FN85]

[FN85] Case of Ivcher-Bronstein. Judgment of 6 February 2001. Series C No. 74, para. 146; Case of "The Last Temptation of Christ" (Olmedo Bustos et al.). Judgment of February 5, 2001. Series C No. 73, para. 64; and Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 del 13 November 1985. Series A No. 5, para. 30.

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109. In this respect, the Court has indicated that the first dimension of freedom of expression "is not exhausted in the theoretical recognition of the right to speak or write, but also includes, inseparably, the right to use any appropriate method to disseminate ideas and allow them to reach the greatest number of persons." [FN86] In this sense, the expression and dissemination of ideas and information are indivisible, so that a restriction of the possibilities of dissemination represents directly, and to the same extent, a limit to the right to free expression. [FN87]

[FN86] Cf. Case of Ivcher-Bronstein, supra note 85, para. 147; Case of "The Last Temptation of Christ" (Olmedo Bustos et al.), supra note 85, para. 65; and Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, supra note 85, para. 31.
[FN87] Case of Ivcher-Bronstein, supra note 85, para. 147; Case of "The Last Temptation of Christ", supra note 85, para. 65; and Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, supra note 85, para. 36.

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110. Regarding the second dimension of the right to freedom of expression, the social element, it is necessary to indicate that freedom of expression is a way of exchanging ideas and information between persons; it includes the right to try to communicate one's point of view to others, but it also implies everyone's right to receive other people's opinions, information and news. For the ordinary citizen, awareness of other people's opinions and information is as important as the right to impart their own. [FN88]

[FN88] Cf. Case of Ivcher-Bronstein, supra note 85, para. 148; Case of "The Last Temptation of Christ" (Olmedo Bustos et al.), supra note 85, para. 66; and Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, supra note 85, para. 32.

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111. This Court has stated that both dimensions are of equal importance and should be guaranteed simultaneously in order to give full effect to the right to freedom of expression in the terms of Article 13 of the Convention. [FN89]

[FN89] Cf. Case of Ivcher-Bronstein, supra note 85, para. 149; Case of "The Last Temptation of Christ" (Olmedo Bustos et al.), supra note 85, para. 67; and Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, supra note 85, para. 33.

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2) Freedom of thought and expression in a democratic society

112. In its Advisory Opinion OC-5/85, the Inter-American Court referred to the close relationship that exists between democracy and freedom of expression, when it stated that:

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a conditio sine qua non for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free. [FN90]

[FN90] Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights) supra note 85, para. 70.

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113. In the same terms used by the Inter-American Court, the European Court of Human Rights has underscored the importance that freedom of expression has in a democratic society, when it stated that:

[…] freedom of expression constitutes one of the essential pillars of democratic society and a fundamental condition for its progress and the personal development of each individual. This freedom should not only be guaranteed with regard to the dissemination of information and ideas that are received favorably or considered inoffensive or indifferent, but also with regard to those that offend, are unwelcome or shock the State or any sector of the population. Such are the requirements of pluralism, tolerance and the spirit of openness, without which no 'democratic society' can exist. […] This means that […] any formality, condition, restriction or sanction imposed in that respect, should be proportionate to the legitimate end sought. [FN91]

[FN91] Cf. Case of Ivcher-Bronstein, supra note 85, para. 152; Case of "The Last Temptation of Christ" Case (Olmedo Bustos et al.), supra note 85, para. 69; Eur. Court H.R., Case of Scharsach and News Verlagsgesellschaft v. Austria, Judgment of 13 February, 2004, para. 29; Eur. Court H.R., Case of Perna v. Italy, Judgment of 6 May, 2003, para. 39; Eur. Court H.R., Case of Dichand and others v. Austria, Judgment of 26 February, 2002, para. 37; Eur. Court. H.R., Case of Lehideux and Isorni v. France, Judgment of 23 September, 1998, para. 55; Eur. Court H.R., Case of Otto-Preminger-Institut v. Austria, Judgment of 20 September, 1994, Series A no. 295-A, para. 49; Eur. Court H.R. Case of Castells v Spain, Judgment of 23 April, 1992, Series A. No. 236, para. 42; Eur. Court H.R. Case of Oberschlick v. Austria, Judgment of 25 April, 1991, para. 57; Eur. Court H.R., Case of Müller and Others v. Switzerland, Judgment of 24 May, 1988, Seriess A no. 133, para. 33; Eur. Court H.R., Case of Lingens v. Austria, Judgment of 8 July, 1986, Seriess A no. 103, para. 41; Eur. Court H.R., Case of Barthold v. Germany, Judgment of 25 March, 1985, Seriess A no. 90, para. 58; Eur. Court H.R., Case of The Sunday Times v. United Kingdom, Judgment of 29 March, 1979, Seriess A no. 30, para. 65; and Eur. Court H.R., Case of Handyside v. United Kingdom, Judgment of 7 December, 1976, Seriess A No. 24, para. 49.

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114. The African Commission on Human and Peoples' Rights [FN92] and the United Nations Human Rights Committee [FN93] have also upheld this same principle.

[FN92] Cf. African Commission on Human and Peoples' Rights, Media Rights Agenda and Constitutional Rights Project v. Nigeria, Communication Nos. 105/93, 128/94, 130/94 and 152/96, Decision of 31 October, 1998, para 54.
[FN93] Cf. U.N. Human Rights Committee, Aduayom et al. v. Togo (422/1990, 423/1990 and 424/1990), report of July 12, 1996, para. 7.4.

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115. On September 11, 2001, the Chiefs of State and Heads of Government of the Americas approved the Inter-American Democratic Charter, Article 4 of which reads in part as follows:

[t]ransparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy. [FN94]

[FN94] Inter-American Democratic Charter, approved at the first plenary session of the General Assembly, September 11, 2001, Article 4.

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116. Thus, the different regional systems for the protection of human rights and the universal system agree on the essential role played by freedom of expression in the consolidation and dynamics of a democratic society. Without effective freedom of expression, exercised in all its forms, democracy is enervated, pluralism and tolerance start to deteriorate, the mechanisms for control and complaint by the individual become ineffectual and, above all, a fertile ground is created for authoritarian systems to take root in society.

3) The role of the mass media and of journalism with regard to freedom of thought and expression

117. The media play an essential role as vehicles for the exercise of the social dimension of freedom of expression in a democratic society, which is why it is vital that the media are able to gather the most diverse information and opinions. [FN95] The media, as essential instruments of freedom of thought and expression, are required to discharge their social function responsibly.

[FN95] Cf. Case of Ivcher-Bronstein, supra note 85, para. 149.

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118. Within this context, journalism is the primary and principal manifestation of freedom of expression of thought. For that reason, journalism cannot be equated with the mere delivery of a public service through the practice of university-acquired knowledge or training. [FN96] To the contrary, the profession that journalists practice is the mass media business. [FN97] The practice of journalism, therefore, requires that the individual engage responsibly in activities that are

indistinguishable from or inextricably intertwined with the freedom of expression guaranteed in the Convention. [FN98]

[FN96] Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, supra note 85, para. 71.
[FN97] The "La Nación" Case. Provisional Measures. Order of the Inter-American Court of Human Rights of September 7, 2001, Considering 10.
[FN98] Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, supra note 85, paragraphs 72 and 74.

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119. The Court has held that it is essential that journalists who work in the media should enjoy the necessary protection and independence to exercise their functions to the fullest, because it is they who keep society informed, an indispensable requirement to enable society to enjoy full freedom and for public discourse to become stronger. [FN99]

[FN99] Cf. Case of Ivcher-Bronstein, supra note 85, para. 150.

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4) Permissible restrictions on freedom of thought and expression in a democratic society

120. Freedom of expression is not an absolute right; instead, it may be subject to restrictions, as Article 13 paragraphs 4 and 5 of the Convention provide. Article 13(2) of the American Convention provides for the possibility of establishing restrictions on freedom of expression where it states that abusive exercise of the right to freedom of expression shall be subject to subsequent imposition of liability. However, beyond what is strictly necessary, such restrictions are not to limit the full scope of freedom of expression or become direct or indirect methods of prior censorship. In order to determine subsequent liabilities, three requirements must be met: 1) the restrictions must be previously established by law; 2) they must be intended to ensure the rights or reputation of others or to protect national security, public order, or public health or morals; and 3) they must be necessary in a democratic society.

121. The Court has written the following with regard to these requirements:

the "necessity" and, hence, the legality of restrictions imposed under Article 13(2) on freedom of expression, depend upon a showing that the restrictions are required by a compelling governmental interest. Hence if there are various options to achieve this objective, that which least restricts the right protected must be selected. Given this standard, it is not enough to demonstrate, for example, that a law performs a useful or desirable purpose; to be compatible with the Convention, the restrictions must be justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of the right Article 13 guarantees. Implicit in this standard, furthermore, is the notion that the restriction, even if justified by compelling governmental interests, must be so framed as not to limit the right protected by Article 13 more than is necessary. That is, the restriction must be

proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it. [FN100]

[FN100] Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, supra note 85, para. 46; see also Eur. Court H. R., Case of The Sunday Times v. United Kingdom, supra note 91, para. 59; and Eur. Court H. R., Case of Barthold v. Germany, supra note 91, para. 59.

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122. In its interpretation of Article 10 of the European Convention, the European Court of Human Rights ruled that "necessary," while not synonymous with "indispensable," implies "the existence of a 'pressing social need'" and that for a restriction to be "necessary" it is not enough to show that it is "useful," "reasonable" or "desirable." [FN101] The Court espoused this concept of “pressing social need” in its Advisory Opinion OC-5/85.

[FN101] Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, supra note 85, para. 46; Eur. Court H. R., Case of The Sunday Times, supra note 91, para. 59.

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123. Hence, the restriction must be proportionate to the legitimate interest that justifies it and must be limited to what is strictly necessary to achieve that objective. It should interfere as little as possible with effective exercise of the right to freedom of expression.

124. Now that the Court has determined the content of the right to freedom of thought and expression, has highlighted the importance of freedom of expression in a democratic society and the role that the media and journalism play therein, and has established the requisites that must be met for restrictions on freedom of expression to be compatible with the American Convention, it must now turn its attention, based on the proven facts in the instant case, to the question of whether the restrictions allowed on freedom of expression through subsequent imposition of liability were compatible with the Convention. At the outset it must be said that Mr. Herrera Ulloa was a journalist stating facts or opinions of public interest.

125. The jurisprudence constante of the European Court of Human Rights with regard to the permissible limits on freedom of expression has been that a distinction must be made between the limits that apply when the restriction is to protect a private individual and those that apply when the restriction is to protect a public figure, such as a politician. That Court has written that:

the limits of acceptable criticism are wider with regard to a politician acting in his public capacity than in relation to a private individual, as the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance. A politician is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements

of that protection have to be weighed against the interests of the open discussion of political issues. [FN102]
Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention. [FN103]

[FN102] Cf. Eur. Court H.R., Case of Dichand and others v. Austria, supra note 91, para. 39; Eur. Court H.R, Case of Lingens v. Austria, supra note 91, para. 42.
[FN103] Case of Lingens v. Austria, supra note 91, para. 42.
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126. In another judgment, the European Court ruled that:

[…] freedom of expression […]is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. […] The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. [FN104]

[FN104] Cf. Eur. Court H.R., Case of Castells v. Spain, supra note 91, paragraphs 42 and 46.
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127. Democratic control exercised by society through public opinion encourages the transparency of State activities and promotes the accountability of public officials in public administration, for which there should be a reduced margin for any restriction on political debates or on debates on matters of public interest. [FN105]

[FN105] Cf. Case of Ivcher-Bronstein, supra note 85, para. 155 ; see also Eur. Court H.R., Case of Feldek v. Slovakia, Judgment of July 12, 2001, para. 88, and Eur. Court H.R., Case of Sürek and Özdemir v. Turkey, Judgment of July 8, 1999, para. 60.
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128. In this context, it is logical and appropriate that statements concerning public officials and other individuals who exercise functions of a public nature should be accorded, in the terms of Article 13(2) of the Convention, a certain latitude in the broad debate on matters of public interest that is essential for the functioning of a truly democratic system. The foregoing considerations do not, by any means, signify that the honor of public officials or public figures should not be legally protected, but that it should be protected in accordance with the principles of democratic pluralism.

129. A different threshold of protection should be applied, which is not based on the nature of the subject, but on the characteristic of public interest inherent in the activities or acts of a specific individual. Those individuals who have an influence on matters of public interest have laid themselves open voluntarily to a more intense public scrutiny and, consequently, in this domain, they are subject to a higher risk of being criticized, because their activities go beyond the private sphere and belong to the realm of public debate.

130. Given the foregoing, this Court will now determine whether the criminal sanction imposed on journalist Mauricio Herrera Ulloa was a necessary restriction in a democratic society and therefore compatible with the American Convention.

131. In the instant case, the information reported in the Belgian press about diplomat Félix Przedborski, Costa Rica's representative to the International Atomic Energy Agency in Vienna, and his alleged illicit activities, drew journalist Mauricio Herrera Ulloa's immediate attention. He reproduced a portion of the news reported in the Belgian press. The Court notes that journalist Herrera Ulloa basically confined himself to reproducing the news reports having to do with a public official's conduct abroad.

132. This Court must go on record as noting that as a consequence of his actions, Mr. Herrera Ulloa was subjected to criminal prosecution and convicted. Invoking articles 146, 149 and 152 of the Costa Rican Penal Code, the judge ruled that Mr. Herrera Ulloa's justification defense (exceptio veritatis) had to be disregarded as he had failed to prove that the facts that various European newspapers attributed to Mr. Félix Przedborski were true; instead, the judge wrote, he was only able to show that "questions were raised in the European press about the party filing the criminal complaint." Thus, the court disallowed the justification defense because the journalist had not proved the veracity of the facts reported in the European newspapers. This standard of proof is an excessive limitation on freedom of expression that does not comport with Article 13(2) of the Convention.

133. The effect of the standard of proof required in the judgment is to restrict freedom of expression in a manner incompatible with Article 13 of the American Convention, as it has a deterrent, chilling and inhibiting effect on all those who practice journalism. This, in turn, obstructs public debate on issues of interest to society.

134. The European Court has held the following in this regard:

[…] punishment of a journalist for assisting in the dissemination of statements made by another person ... would seriously hamper the contribution of the press to discussion of matters of public interest. [FN106]

[FN106] Eur. Court H.R., Case of Thoma v. Luxemburg, Judgement of March 29, 2001, para. 62.

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135. The Court therefore finds that the State violated the right to freedom of thought and expression protected under Article 13 of the American Convention on Human Rights, in relation to Article 1(1) thereof, to the detriment of Mr. Mauricio Herrera Ulloa, since the restriction on this journalist's exercise of that right oversteps the boundaries set in that article.

136. The Court will not take up the allegation made by the Commission and by the alleged victims' representatives to the effect that Article 2 of the Convention was violated, because the facts in this case do not fit the propositions upon which that article is based.

XI. VIOLATION OF ARTICLES 8 AND 25 IN COMBINATION WITH ARTICLES 1(1) AND 2 (RIGHT TO A FAIR TRIAL AND RIGHT TO JUDICIAL PROTECTION)

Pleadings of the alleged victims' representatives

137. In their brief of pleadings, motions and evidence, the alleged victims' representatives argued that the State violated Article 8 of the Convention; in their final oral arguments and final written pleadings, they argued that the State had also violated Article 25 of the Convention. Their pleadings were as follows:

137(1) With regard to the admissibility of the petition alleging violations of Article 8 of the Convention:

a) the Commission did not address these claims in either its Report No. 84/02 or in the application. The representatives contend that they are not attempting to bring new facts to the Court's attention; instead, their purpose is to get a court to examine facts that are a matter of record, have been proven, were never disputed when the case was before the Commission, and were narrated in the application. They are also seeking application of the maxim of the law known as iura novit curia;
b) when the lower court found against Mr. Mauricio Herrera Ulloa, his only procedural recourse to challenge the conviction was a writ of cassation. Given the limitations of the writ of cassation, it does not meet the standard required under Article 8(2)(h) of the Convention as it does not allow appeal to a higher court;
c) in the instant case, the writ of cassation was inadequate and illusory, which violated Mr. Herrera Ulloa's right to a competent, independent and impartial judge or tribunal (Article 8(1) of the Convention).

137(2) With regard to the right to appeal a judgment to a higher court (Article 8(2)(h) of the Convention) and of the right to judicial protection (Article 25 of the Convention), the representatives argued that:

a) the writ of cassation is not a full remedy; it is an extraordinary remedy. It does not authorize a full review of the facts and the law in the case. Instead, it is used to resolve a variety of complicated procedural formalities, and hence is not an appeal in the sense of Article 8(2)(h) of the Convention. The writ of cassation will not reopen the case for additional evidence to be taken, nor re-assess the evidence already produced. Nor does it offer any other means of defense other than those listed in Article 369 of Costa Rica's Code of Criminal Procedure;

b) by a judgment delivered in another case on June 26, 1990, the Constitutional Chamber of Costa Rica's Supreme Court held that the extraordinary remedy of cassation does satisfy the requirements of the American Convention, provided it is not regulated, interpreted or applied with mechanical rigor. This Third Chamber of the Costa Rican Supreme Court did not abide by that earlier ruling in the case involving journalist Mauricio Herrera Ulloa and the newspaper "La Nación", as the judgment it delivered on January 24, 2001, "by using evasive formalisms, circumvent[ed] the full review of the lower court judgment that should happen with a broad and full appeal";

c) the writ of cassation does not allow, for example, a review of the facts established as true in the lower court judgment;

d) in the instant case, the writ of cassation was exercised liberally, but the Third Chamber of the Costa Rican Supreme Court ruling was a pro forma decision, which dismissed the writ on formal and narrow grounds, thereby violating the alleged victims' right to appeal the conviction by means of a full review by a higher court;

e) in the Costa Rican legal system, the only procedural regime that has no remedy of appeal is the one for cases in the criminal courts. There is no court of second instance for criminal cases, which is a violation of articles 8(2)(h) and 2 of the Convention;

f) the Fourth Chamber of the Costa Rican Supreme Court ordered that to be in compliance with Article 8(2)(h) of the Convention, the writ of cassation was not to be interpreted or applied with mechanical rigor; that ruling was disregarded in the cassation judgment delivered against Mauricio Herrera Ulloa;

g) it has been shown, then, that the writ of cassation in a criminal law case did not allow the facts established in the November 12, 1999 judgment of the Criminal Court of the First Judicial Circuit of San José, Group three, which convicted Mr. Mauricio Herrera Ulloa, to be reviewed or checked; hence, the writ of cassation in criminal cases does not meet the requirements necessary to constitute an effective remedy filed with a higher court, in the sense of articles 8(2)(h) and 25 of the Convention;

h) as was established in the expert opinion given by Mr. Carlos Tiffer Sotomayor, in Costa Rica the writ of cassation does not allow a full review of a judgment; hence, it cannot be used to check the evidence assessment or other questions of fact;

i) the right to appeal a judgment to a higher court can be construed as an expression of the right to an effective recourse, upheld in Article 25(1) of the Convention. Furthermore, the lack of an effective remedy of appeal is a violation of Article 25(2)(b) of the Convention, which provides that the States parties undertake "to develop the possibilities of judicial remedy";

j) elsewhere the Commission has held that as a mechanism for reviewing judgments, an appeal has characteristics that are: a) procedural: an appeal must go forward against any lower court judgment to check for misapplication of the law or failure to apply the law, or the misapplication of the provisions of the law that determined the outcome of the judgment, and b) material: an appeal must go forward when an irreversible error has occurred, when the accused has not enjoyed a proper defense, or when rules of evidence assessment are violated, provided those violations have caused the rules of evidence to be misapplied or not applied at all;

k) international case law has tended to regard remedies that do not permit a review of the facts and of the law applied, to be contrary to international human rights law; and

l) in attempting to refute the violation of Article 8(1) of the Convention, the State is admitting that the writ of cassation is only permissible in matters of procedure; therefore, on

cassation, the Third Chamber of the Costa Rican Supreme Court did not have an opportunity to review the facts of the criminal case against Mr. Mauricio Herrera Ulloa.

137(3) With regard to the right to a hearing by an impartial judge or tribunal (Article 8(1) of the Convention), the representatives argued that:

a) there was very little room for judicial impartiality, as the justices who had issued the final judgment had already advanced their views on the subject less than two years before the final ruling;
b) in the wake of the nullification ordered by the Third Chamber of the Costa Rican Supreme Court, the second judgment delivered by the court of first instance adhered to the criterion established by the Third Chamber, "so that when the same justices took up the case for a second time on cassation, they confined themselves to checking to make certain that the position they had already taken on the facts in the very same case had been effectively applied"; and
c) if judges are to be impartial, they must not be predisposed or biased; therefore, the justices who had nullified the first conviction should never have been the judges to hear the writ of cassation.

137(4) With regard to the right to be presumed innocent (Article 8(2) of the American Convention), the representatives argued that:

a) in convicting Mr. Herrera Ulloa, the Costa Rican courts maintained that in a "case involving the crime of publishing insults […], the defendant's mens rea need not be proved. This is also true in cases involving criminal defamation. In other words, the intent to harm another person's honor need not be proved." The party filing the criminal complaint did not have to prove the defendant's criminal intent; instead, it was the defendant who was required to prove the veracity of the stories reported in the European press. The doctrine of exceptio veritatis implies a kind of presumption of guilt, or at the very least reverses the burden of proof to the journalist's disadvantage. In fact, it should be the party making the charge that is required to prove the defendant's bad faith or mens rea; a defendant should not be required to prove negatives, i.e., that he did not act with malicious intent or with reckless disregard of the truth or with knowledge that the facts reported were false;
b) in the instant case, the party making the charge was not required to prove the journalist's culpable conduct; instead, it was the journalist who was required to prove the accuracy of information reported by third parties on another continent; that was the only way he could be acquitted. "A genuine probatio diabolica was forced upon him that left the presumption of innocence devoid of any content or effect;"
c) the Costa Rican courts applied the principle of exceptio veritatis to prosecute and convict Mr. Mauricio Herrera Ulloa and the newspaper "La Nación" and thus violated Article 8(2) of the Convention;
d) the State violated Article 1(1) of the Convention, in combination with articles 13 and 8 thereof, to the detriment of Mssrs. Mauricio Herrera Ulloa and Fernán Vargas Rohrmoser; and
e) Article 2 of the Convention not only requires the States parties to adopt new domestic legal provisions, but also to suppress any law or practice that is incompatible with the obligations undertaken with the Convention.

Pleadings of the Commission

138. The Inter-American Commission did not allege violation of articles 8 and 25 of the American Convention.

Pleadings of the State

139. The State made no reference to the alleged violation of Article 25 of the Convention. On the matter of Article 8 it asserted that:

139(1) With regard to the right to appeal a judgment to a higher court (Article 8(2)(h) of the Convention):

a) the Convention requires that domestic legal systems provide a means to challenge a ruling; it also requires that the remedy be decided by a court higher than the one that delivered the judgment. The second condition is not in dispute. The Court does not demand that the remedy be an ordinary remedy; it only demands that it be a "genuine guarantee that the case will be re-examined" and that the existence of a remedy is not sufficient if that objective is not accomplished. Neither the Convention nor the Court requires that the remedy be one of appeal. The writ of cassation meets the requirements that a remedy must have to meet the standards required by the Convention. "The Convention [does not] require that the [State] have a court of second instance, understood as a body for full review of a ruling delivered by a court from which a case has been removed; what it does require is that States ensure for their citizens that a means will be there to review a ruling by a judge or court of first instance, thus enabling the judgment to be truly reconsidered";
b) courts of cassation used their own rulings to set about the task of removing some of the procedural formality that the writ of cassation involves; those rulings recognize the need to strip away the restrictions that excessive formality causes. Under certain circumstances, courts of cassation have even gone so far as to deviate somewhat from the set of facts examined in the judgment delivered by the court of first instance;
c) when setting out the grounds under which an interested party may file a writ of cassation, the Code of Criminal Procedure makes no distinction between those related to merits and those related to procedure, so that the person availing himself of that remedy is not required to make that distinction either;
d) Article 8(2)(h) of the Convention does not require that the remedy to challenge a ruling by a court of first instance be a full review. An examination of procedural errors allows for evidentiary activity. The grounds under which a writ of cassation may be filed guarantee the right to appeal the ruling. Various defects in a judgment are grounds for cassation;
e) "it is true that the remedy of cassation does have limits –as, for example, the untouchability of the proven facts - and that it is not a full review; but the Convention does not require a full review." Furthermore, those limitations are the ones "strictly necessary to keep in place a procedural system based on oral proceedings." It is more advantageous to the accused (in general for the administration of criminal justice) that a system provide a remedy with certain limitations, as a trade-off to get a criminal justice process that puts the emphasis on oral proceedings;

f) the writ of cassation as a means to challenge criminal court rulings is found in legal systems throughout Latin America; and
g) the State is convinced that it has taken the necessary measures to guarantee fundamental rights.

139(2) With regard to the right to be heard by an impartial judge or tribunal (Article 8(1) of the Convention), the State asserted that:

a) bias on the part of a judge cannot be assumed simply because he has somehow been associated with the object of the proceeding. The very nature of the writ of cassation is such that it prevents violations of the guarantee of impartiality, as the court of cassation serves as a merits tribunal and does not issue any finding as to the facts. The court of cassation only verifies whether the judgment adheres to the law, both with respect to substantive law and procedural law. When the Court of Cassation sends a case back to the court that decided it, it does so because it has discovered procedural defects; it never goes to the arguments presented on the merits or examines the facts. Therefore, when it decided the writ of cassation filed against the acquittal, the Third Chamber of the Costa Rican Supreme Court never issued any finding that could have influenced the ruling of the court of first instance; and
b) if Mr. Mauricio Herrera Ulloa believed that the conclusion reached by the Third Chamber of the Costa Rican Supreme Court "violated the principle of an impartial judge," he should have filed the remedy seeking review provided for in Article 408(g) of the Costa Rican Code of Criminal Procedure. That article lists "violation or absence of due process" as one of the grounds for review of a conviction.

139(3) With regard to the right to a presumption of innocence (Article 8(2) of the American Convention) the State asserted that:

a) the crime of which Mr. Herrera Ulloa was convicted is one of criminal intent, and meant that the person filing the criminal complaint had to prove intent on the part of the person being so accused;
b) a profound misunderstanding of the principle of exceptio veritatis is apparent. This principle is an exculpatory circumstance; by the time it comes into play, it has already been established that the defendant's conduct fits the crime, is unlawful and answerable. Therefore, it does not relieve the party filing the criminal complaint of his obligation to prove mens rea in the defendant's conduct;
c) the question of the veracity of the attribution is not a defining element in the case of criminal defamation or criminal insult (whereas veracity is a defining element in criminal slander). Therefore, truth does not have to be proved to find that the conduct fits the crime. The exceptio veritatis assumes the existence of a public interest, which justifies the preclusion of punishment, since the author's conduct was not motivated solely by a desire to offend;
d) when a justifying or exculpatory circumstance is claimed, the defendant must prove that the justifying or exculpatory circumstance described by the law is present. This does not violate the principle of presumption of innocence because the accusing body or party filing the criminal complaint bears the burden of proving that the defendant committed the crime and is guilty; and

e) the inversion of the burden of proof that Article 149 of the Penal Code establishes is the same standard that would apply to any other justifying or exculpatory circumstance provided for under the Costa Rican Penal Code.

Considerations of the Court

140. The Court will not examine the allegation made belatedly by the alleged victims' representatives in their final oral arguments and final written briefs, to the effect that Article 25 of the American Convention was violated, as this allegation does not fit the facts of the instant case.

141. The pertinent part of Article 8 of the American Convention provides that:

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.
2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
[…]
h) the right to appeal the judgment to a higher court.

142. On the question of whether the alleged victims' representatives may include facts or rights other than those included in the original application, this Court has previously held that:

[w]ith respect to inclusion of rights other than those already encompassed by the application filed by the Commission, the Court deems that the applicants can invoke said rights. It is they who are entitled to all the rights embodied in the American Convention, and not admitting this would be an undue restriction of their status as subjects of International Human Rights Law. It is understood that the above, pertaining to other rights, adheres to the facts already contained in the application. [FN107]

[FN107] Cf. Case of Maritza Urrutia, supra note 7, para. 134; Case of Myrna Mack-Chang, supra note 7, para. 224; and the Case of "Five Pensioners". Judgment of 28 February 2003. Series C No. 98, para. 155.
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143. Therefore, the Court will examine the alleged violation of Article 8 of the Convention, which the alleged victims' representatives asserted in their written brief of pleadings, motions and evidence.

144. It is a basic principle of the law on the international responsibility of States, embodied in international human rights law, that every State is internationally responsible for any action or omission committed by any of its branches of power or organs in violation of internationally

recognized rights. [FN108] In the case of the actions or omissions of domestic courts, Article 8 of the Convention spells out the scope of that principle whereby the international responsibility of a State is engaged by the actions or omissions of any and all State organs. [FN109]

[FN108] Cf. Case of Juan Humberto Sánchez, supra note 20, para. 142; the Case of "Five Pensioners", supra note 107, para. 163; and the Case of "Street Children" (Villagrán Morales et al.). Judgment of November 19, 1999. Series C No. 63, para. 220.
[FN109] Case of "Street Children" (Villagrán Morales et al.), supra note 108, para. 220.

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145. States have the responsibility to embody in their legislation, and ensure proper application of, effective remedies and guarantees of due process of law before the competent authorities, which protect all persons subject to their jurisdiction from acts that violate their fundamental rights or that lead to the determination of the latter's rights and obligations. [FN110]

[FN110] Cf. Case of Baena-Ricardo et al. Competence. Judgment of November 28, 2003. Series C No. 104, para. 79; Case of Cantos. Judgment of November 28, 2002. Series C No. 97, para. 59; and the Case of Mayagna (Sumo) Awas Tingni Community, Judgment of August 31, 2001. Series C No. 79, para. 135.

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146. In similar cases this Court has held that "[i]n order to clarify whether the State has violated its international obligations owing to the acts of its judicial organs, the Court may have to examine domestic proceedings" [FN111] to determine whether they are compatible with the American Convention.

[FN111] Cf. Case of Myrna Mack-Chang, supra note 7, para. 200; Case of Juan Humberto Sánchez, supra note 20, para. 120; and Case of Bámaca-Velásquez. Judgment of 25 November 2000. Series C No. 70, para. 188.

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147. With regard to the criminal proceedings, when addressing the matter of judicial guarantees, also known as procedural guarantees, the Court has established that all the Article 8 requirements, which "are designed to protect, to ensure or to assert the entitlement to a right or the exercise thereof", [FN112] must be complied with; in other words, "the conditions necessary to ensure the adequate representation or management of the interests or claims of those whose rights or obligations are under judicial consideration." [FN113]

[FN112] Cf. Case of Maritza Urrutia, supra note 7, para. 118; Case of Myrna Mack-Chang, supra note 7, para. 202; Case of Juan Humberto Sánchez, supra note 20, para. 124; and Habeas Corpus

in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights). Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 25.
[FN113] Cf. Case of Maritza Urrutia, supra note 7, para. 118; Case of Myrna Mack-Chang, supra note 7, para. 202; Case of Juan Humberto Sánchez, supra note 20, para. 124; and The Right to Information on Consular Assistance. In the Framework of the Guarantees of the due Process of Law. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 118.
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148. The Court will examine the alleged violations of Article 8 of the Convention. It will begin with the right of appeal to a higher court, provided for in Article 8(2)(h) of the Convention, then move on to the right to an impartial judge recognized in Article 8(1) of the Convention, and finally the right to the presumption of innocence established in Article 8(2) of the Convention.

149. Under Costa Rican law, the only remedy available to challenge a criminal conviction is the writ of cassation, regulated under articles 443 to 451 of the Costa Rican Code of Criminal Procedure.

150. Article 443 of the Costa Rican Code of Criminal Procedure provides that "the writ of cassation shall be in order when the court's order fails to observe or misapplies some principle of the law." Article 369 of the Code of Criminal Procedure provides that the defects in a judgment that are grounds for cassation are as follows: a) the accused is not adequately identified; b) the circumstances of the fact that the court deemed to have been proved are lacking; c) the verdict is based on means or elements of evidence not legally introduced in trial or introduced by being read, in violation of the provisions of the Code; d) the arguments of the majority of the court with regard to the means or elements of decisive evidence are lacking, insufficient or contradictory, or fail to observe the rules governing reasoned judgment arrived at freely and on the basis of admissible evidence, within the relevant legal framework; e) the essential elements of the operative part of the judgment are missing; f) the date of the act is either missing or cannot be determined, or the signature of some of the judges is not present and it cannot be determined whether they participated in the deliberations on the case, save for those exceptions that the law provides; g) the rules for deliberating on and drafting the judgment were not observed; h) the rules regarding the correlation between the judgment and the charge were not observed, and i) the substantive law was either not observed or misapplied.

151. Article 445 of the Code of Criminal Procedure provides that the writ of cassation shall be filed with the court that delivered the judgment, "by means of a reasoned brief, which shall clearly cite the legal provisions that were not observed or misapplied and explicitly state what claim is being made." It states further that "each cause and its legal grounds shall be listed individually." Article 446 of the same Code provides that once the corresponding time period has been set, the court in question shall refer the case file to either the Third Chamber of the Costa Rican Supreme Court or to the Court of Criminal Cassation, depending upon which has territorial jurisdiction. If it is the Third Chamber that takes cognizance of the writ of cassation, then it shall be composed of five justices. If the case goes to the Court of Cassation, it shall be composed of three judges.

152. Under articles 448 and 449 of the Code of Criminal Procedure, in processing the writ of cassation the court may call an oral hearing and order the taking of whatever evidence will be useful in determining whether procedural law has been violated; however, no evidence may be introduced to prove whether or not the crime was committed.

153. Article 450 of the Code of Criminal Procedure provides that should the court of cassation deem it appropriate, it will nullify all or part of the decision being challenged and will reinstate the case or order a new decision. It states further that when only part of the original judgment is annulled, the concrete object of the new trial or decision shall be indicated; otherwise, "the error shall be corrected" and the matter decided in accordance with the applicable law.

154. As has been shown (supra para. 95(w)), a writ of cassation was filed twice during the criminal case against journalist Mauricio Herrera Ulloa. The first was filed by the attorney for Mr. Félix Przedborski (supra para. 95(r)) challenging the verdict of acquittal that the Criminal Court of the First Judicial Circuit of San José delivered on May 29, 1998 (supra para. 95(q)). When it arrived at its decision on this writ on May 7, 1999, the Third Chamber of the Costa Rican Supreme Court nullified the verdict being challenged on the grounds of an error on the part of the court in explaining the absence of mens rea that was the grounds for the acquittal. It ordered that the case be sent back to the competent court for retrial (supra para. 95(s)).

155. On November 12, 1999, the Criminal Court of the First Judicial Circuit of San José convicted Mr. Mauricio Herrera Ulloa on four counts of publishing offenses constituting defamation (supra para. 95(t)). Two writs of cassation were filed to challenge the verdict, one by defense counsel for the defendant and the special attorney for the newspaper "La Nación", and the other by Mssrs. Herrera Ulloa and Vargas Rohrmoser, respectively (supra para. 95(w)).

156. On January 24, 2001, the Third Chamber of the Costa Rican Supreme Court dismissed the two writs of cassation. As a result of that decision, the November 12, 1999 conviction became final (supra para. 95(x)). The Chamber that took cognizance of these two writs was composed of the very same justices who, on May 7, 1999, had decided the writ of cassation filed by the attorney for Mr. Félix Przedborski (supra paragraphs 95(r) and 95(s)) and who had ordered nullification of the May 29, 1998 verdict of acquittal (supra para. 95(s)).

a) Right to appeal to a higher court (Article 8(2)(h) of the Convention)

157. Article 8(2)(h) of the American Convention provides that in a case, every person is entitled, with full equality, "to appeal the judgment to a higher court."

158. The Court considers that the right to appeal a judgment is an essential guarantee that must be respected as part of due process of law, so that a party may turn to a higher court for revision of a judgment that was unfavorable to that party's interests. The right to file an appeal against a judgment must be guaranteed before the judgment becomes res judicata. The aim is to protect the right of defense by creating a remedy to prevent a flawed ruling, containing errors unduly prejudicial to a person's interests, from becoming final.

159. The Court has held that the right to appeal a judgment, recognized in the Convention, is not satisfied merely because there is a higher court than the one that tried and convicted the accused and to which the latter has or may have recourse. For a true review of the judgment, in the sense required by the Convention, the higher court must have the jurisdictional authority to take up the particular case in question. It is important to underscore the fact that from first to last instance, a criminal proceeding is a single proceeding in various stages, [FN114] including the processing of the ordinary challenges filed against the judgment.

[FN114] Cf. Case of Castillo Petruzzi et al. Judgment of 30 May 1999. Series C No. 52, para. 161.

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160. Article 31(1) of the 1969 Vienna Convention on the Law of Treaties provides that:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

161. In keeping with the object and purpose of the American Convention, which is effective protection of human rights, [FN115] the remedy contemplated in Article 8(2)(h) of the Convention must be an effective, ordinary remedy whereby a higher judge or court corrects jurisdictional decisions that are not in keeping with the law. While States have a margin of discretion in regulating the exercise of that remedy, they may not establish restrictions or requirements inimical to the very essence of the right to appeal a judgment. The Court has established that the "formal existence of remedies is not sufficient; these must be effective;" in other words, they must provide results or responses to the end that they were intended to serve. [FN116]

[FN115] Cf. Case of Baena-Ricardo et al. Competence. Judgment of November 28, 2003. Series C No. 104, para. 95; Case of Cantos. Preliminary Objections. Judgment of September 7, 2001. Series C No. 85, para. 37; and Case of Constantine et al. Preliminary Objections, supra note 24, para. 86.

[FN116] Cf. Case of Baena-Ricardo et al. Competence, supra note 115, para. 77; Case of Maritza Urrutia, supra note 7, para. 117; and Case of Juan Humberto Sánchez, supra note 20, para. 121.

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162. Based on the foregoing considerations, the Court will now determine whether the writ of cassation to which Mr. Mauricio Herrera Ulloa had access fit the parameters described above and whether it was, in the final analysis, a remedy regulated by and applied in accordance with the terms of Article 8(2)(h) of the American Convention.

163. The higher court or judge in charge of deciding the remedy filed against a criminal judgment, has a special duty to protect the judicial guarantees and due process to which all parties to the criminal proceeding are entitled, in accordance with the principles governing that proceeding.

164. The possibility of appealing the judgment must be accessible; the kind of complex formalities that would render this right illusory must not be required.

165. Regardless of the label given to the existing remedy to appeal a judgment, what matters is that the remedy guarantees a full review of the decision being challenged.

166. The Inter-American Court of Human Rights concluded the following in this regard:

[…] the lack of any possibility of fully reviewing the author's conviction and sentence, as shown by the decision [...], the review having been limited to the formal or legal aspects of the conviction, means that the guarantees provided for in article 14, paragraph 5, of the Covenant have not been met. The author was therefore denied the right to a review of his conviction and sentence, contrary to article 14, paragraph 5, of the Covenant. [FN117]

[FN117] U.N., Human Rights Committee, M. Sineiro Fernández v. Spain (1007/2001), report of August 7, 2003, paragraphs 7 and 8; and U.N., Human Rights Committee, C. Gómez Vásquez v. Spain (701/1996), report of July 20, 2000, para. 11.1.

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167. In the instant case, the writs of cassation filed to challenge the November 12, 1999 conviction did not satisfy the requirement of a liberal remedy that would permit the higher court to do a thorough analysis or examination of all the issues debated and analyzed in the lower court. Thus, the writs of cassation filed by Mssrs. Fernán Vargas Rohrmoser and Mauricio Herrera Ulloa, and by the latter's defense attorney and the special counsel for the newspaper "La Nación", respectively (supra para. 95.w) to challenge the conviction did not meet the requirements of Article 8(2)(h) of the American Convention; the review allowed with those remedies was limited, not thorough and comprehensive.

168. The Court therefore finds that the State violated Article 8(2)(h) of the American Convention, in combination with articles 1(1) and 2 thereof, to the detriment of Mr. Mauricio Herrera Ulloa.

b) Right to be heard by an impartial tribunal or judge (Article 8(1) of the Convention)

169. The alleged victims' representatives argued that in the instant case, the State violated the right to be heard by an impartial tribunal or judge, protected under Article 8(1) of the Convention. The Court has held that any person subject to a proceeding of any nature before an organ of the State must be guaranteed that this organ is impartial and that it acts in accordance with the procedure established by law for hearing and deciding cases submitted to it. [FN118]

[FN118] Cf. Case of Ivcher-Bronstein, supra note 85, para. 112; Case of Constitutional Tribunal. Judgment of January 31, 2001. Series C No. 71, para. 77; Case of Castillo-Petruzzi et al., supra note 114, para. 130-131; Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8

American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9., para. 20; and Habeas Corpus in Emergency Situations, supra note 112, para. 30.
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170. The European Court has held that "impartiality" involves both objective and subjective aspects:

First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect. Under the objective test, it must be determined whether, quite apart from the judges' personal conduct, there are ascertainable facts which may raise doubts as to their impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to proceedings. [FN119]

[FN119] Cf. Eur. Court. H. R., Case of Pabla KY v. Finland, Judgment of June 26, 2004, para. 27; and Eur. Court. H. R., Case of Morris v. the United Kingdom, Judgment of February 26, 2002, para. 58.
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171. The right to be tried by an impartial judge or court is a fundamental guarantee of due process. In other words, the person on trial must have the guarantee that the judge or court presiding over his case brings to it the utmost objectivity. This way, courts inspire the necessary trust and confidence in the parties to the case and in the citizens of a democratic society.

172. As has been proved, in the criminal proceeding against Mr. Mauricio Herrera Ulloa, the writ of cassation was filed on two occasions (supra para. 95(r) and 95(w)). The Court notes that the four principal justices and the alternate justice on the bench of the Third Chamber of the Costa Rican Supreme Court when the May 7, 1999 decision on the writ of cassation filed by the attorney for Mr. Félix Przedborski to challenge the acquittal was handed down, were the very same justices who decided the January 24, 2001 writs of cassation that the defense attorney of Mr. Mauricio Herrera Ulloa and the special counsel of the newspaper "La Nación", and Mssrs. Herrera Ulloa and Vargas Rohrmoser, respectively, filed to challenge the conviction (supra para. 95(y)).

173. When the Third Chamber of the Costa Rican Supreme Court decided the first writ of cassation, it nullified the court judgment being challenged and ordered the case sent back to the competent court for retrial, based, inter alia, on the grounds that "[t]he bases of the judgment are not sufficient to reasonably discard the presence of actual or possible malice (with regard to the crimes charged)." (supra para. 95(s)).

174. The justices of the Third Chamber of the Costa Rican Supreme Court should have abstained from taking cognizance of the two writs of cassation filed to challenge the November 12, 1999 conviction because when the writ of cassation filed to challenge the May 29, 1998

acquittal was heard, those very same justices examined the merits and did not confine themselves to the reasons of law.

175. Based on the above considerations, the Court concludes that the justices of the Third Chamber of the Costa Rican Supreme Court that decided the two writs of cassation filed to challenge the conviction, did not meet the impartiality requirement. In the instant case, therefore, the State violated Article 8(1) of the American Convention, in combination with Article 1(1) thereof, to the detriment of Mr. Mauricio Herrera Ulloa.

c) Right to be presumed innocent (Article 8(2) of the Convention)

176. The representatives of the alleged victims argued that in the case prosecuted against Mr. Mauricio Herrera Ulloa and the newspaper "La Nación" the Costa Rican courts, by the manner in which they applied the maxim of exceptio veritatis, "establish[ed] a kind of presumption of guilt, or at least reversed the burden of proof to the journalist's disadvantage." They contend, therefore, that the State violated Article 8(2) of the Convention.

177. Given the circumstances of the instant case, the violation being alleged must be examined in the context of Article 13 of the Convention. In the judgment delivered by the Criminal Court of the First Judicial Circuit of San José on November 12, 1999, the latter required that Mr. Herrera Ulloa prove the veracity of the news published in the Belgian newspapers and then reproduced in "La Nación", which he had simply cited.

178. As a consequence of the situation described in the preceding paragraph and as stated in the chapter on the violation of freedom of thought and expression (supra paragraphs 131, 132, 133 and 135), the Court is dismissing the representatives' allegation and finds that the State did not violate the right to a presumption of innocence protected under Article 8(2) of the American Convention, in combination with Article 1(1).

XII. ARTICLE 50 (THE COMMISSION'S REPORT)

Pleadings of the Commission

179. The Commission did not claim violation of this article.

Pleadings of the alleged victims' representatives

180. The representatives of the alleged victims argued the following with regard to Article 50 of the Convention:

a) The State did not comply with the recommendations made by the Inter-American Commission on Human Rights in the report it prepared under Article 50 of the American Convention, which constitutes per se noncompliance with its international obligations. Moreover, Costa Rica also informed the Commission that it would not take the measures the Commission recommended because "the Executive Branch cannot interfere in decisions taken by the Legislative or Judicial Branch;"

b) the State's international responsibility can be compromised by any State organ; because domestic remedies must be exhausted before the international protection that the inter-American system for the protection of human rights offers can be sought, it is not strange that the violation of those rights should ultimately emanate from the judicial branch;
c) the existence of legislative bills hardly constitutes compliance with the Commission's Article 50 recommendations; and
d) consequently, by not adopting measures to comply with those recommendations and by having advised the Commission that it would not take the measures under domestic law, the State also violated Article 50 of the Convention.

Pleadings of the State.

181. With regard to Article 50 of the Convention, the State asserted that:

a) the right to "believe" that its laws are compatible with the principles of the Convention and the jurisprudence of the Inter-American Court, and hence not to comply with a report that it considers wrong, does not constitute a violation of the Convention; and
b) once the Commission submits the case to the Court, there can be no violation of the Convention for failure to comply with the recommendations made in the Commission's report.

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Considerations of the Court

182. The pertinent part of Article 33 of the Convention reads as follows:

The following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention:
a. the Inter-American Commission on Human Rights
[…]

183. Article 50 of the American Convention provides that:

1. If a settlement is not reached, the Commission shall, within the time limit established by its Statute, draw up a report setting forth the facts and stating its conclusions. If the report, in whole or in part, does not represent the unanimous agreement of the members of the Commission, any member may attach to it a separate opinion. The written and oral statements made by the parties in accordance with paragraph 1.e of Article 48 shall also be attached to the report.
2. The report shall be transmitted to the states concerned, which shall not be at liberty to publish it.
3. In transmitting the report, the Commission may make such proposals and recommendations as it sees fit.

184. In earlier cases, the Court has held that:

Article 50 of the Convention concerns the preparation of a report by the Commission that is transmitted to the State, which may not publish it; it contains a series of recommendations to be complied with to settle the matter. If, within the three months following the transmittal of the report to the State, the matter has not been settled and the Commission considers that the State did not comply, it has two options: to refer the case to the Court, by filing an application or to draw up the report referred to in Article 51 of the Convention, which, by the vote of an absolute majority of its members, shall set forth its opinion and conclusions concerning the question submitted for its consideration. As in the Article 50 report, in the Article 51 report, the Commission shall prescribe a period within which the State must take the necessary measures to comply with the recommendations and, thus, remedy the situation that is being examined. Lastly, once this period has expired, the Commission shall determine whether the State has complied and, if appropriate, decide whether to publish the report (cf: Articles 50 and 51 of the Convention). The Court has already stated that this decision is not discretional, but rather "should be based on the alternative most favourable for the protection of the human rights" established in the Convention. [FN120]

[FN120] Cf. Case of Baena Ricardo et al. Judgment of February 2, 2001. Series C No. 72. para. 189; Case of Baena Ricardo et al. Preliminary Objections. Judgment of November 18, 1999. Series C No. 61, para. 37; and Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights). Advisory Opinion OC-13/93 of July 16, 1993. Series A No. 13, para. 50.

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185. The Court has written that:

[…] the term "recommendations" used by the American Convention should be interpreted to conform to its ordinary meaning, in accordance with Article 31(1) of the Vienna Convention on the Law of Treaties. For that reason, a recommendation does not have the character of an obligatory judicial decision for which the failure to comply would generate State responsibility. [FN121]

[FN121] Cf. Case of Baena Ricardo et al., supra note 120, para. 191; Case of Loayza-Tamayo. Judgment of September 17, 1997. Series C No. 33, para. 79; and Case of Genie-Lacayo. Judgment of January 29, 1997. Series C No. 30, para. 93.

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186. Nevertheless, this Court has also held that:

[…] in accordance with the principle of good faith, embodied in the aforesaid Article 31(1) of the Vienna Convention, if a State signs and ratifies an international treaty, especially one concerning human rights, such as the American Convention, it has the obligation to make every effort to apply with the recommendations of a protection organ such as the Inter-American Commission, which is, indeed, one of the principal organs of the Organization of American

States, whose function is “to promote the observance and defense of human rights” in the hemisphere (OAS Charter, Articles 52 and 111).
Likewise, Article 33 of the American Convention states that the Inter-American Commission is, as the Court, competent "with respect to matters relating to the fulfillment of the commitments made by the State Parties" which means that by ratifying said Convention, States Parties engage themselves to apply the recommendations made by the Commission in its reports. [FN122]

[FN122] Cf. Case of Baena Ricardo et al., supra note 120, para. 192; and Case of Loayza-Tamayo, supra note 121, paragraphs 80 and 81.
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187. This Court considers that, in keeping with its jurisprudence constante, once a case is submitted to the Court, it is up to the Court to determine whether or not the State violated substantive precepts of Convention; if so, it must then determine the consequences of those violations. If a case is not submitted to the Court, however, it is not up to the Court to determine the international responsibilities that the State has incurred arising from State’s procedural conduct in the case before the Commission; in fact, a finding of responsibility is a necessary antecedent before a case can be submitted to the Court. [FN123]

[FN123] Cf. Case of Baena Ricardo et al., supra note 120, para. 193.

XIII. REPARATIONS (Application of Article 63(1) of the Convention)

Pleadings of the Commission

188. The Commission asserted that the victims and their representatives were entitled to reparations and costs. The Commission’s pleadings with regard to Article 63(1) of the Convention are summarized below:

a) the beneficiaries of the reparations ordered by the Court as a result of the violations found are: Mauricio Herrera Ulloa and Fernán Vargas Rohrmoser;
b) the measures to guarantee enjoyment of the violated right and the reparations required to bring the State into compliance with its international responsibility include, inter alia, the following: restitution, measures of reparation and satisfaction and the payment of expenses and legal fees incurred to bring the case both to the domestic courts and to international jurisdiction;
c) given the special characteristics of this case, measures of non-pecuniary reparations are of particular importance;
d) the State has an obligation to make financial reparation to journalist Mauricio Herrera Ulloa and Mr. Vargas Rohrmoser for the damages suffered;
e) the damnum emergens and lucrum cessans require special consideration in the instant case, since there was no way to put a quantum on those damages at the time the application was filed. The amounts for damnum emergens and lucrum cessans could only have been determined

if the damages ordered in the judgment of conviction against the property of Mr. Herrera Ulloa had been enforced at the domestic level;

f) the moral damage consists on the impact that the violation has had on his practice of journalism and the personal toll that the conviction took on Mr. Herrera Ulloa, especially given his profession, where the journalist's credibility and personal image are paramount. A journalist's performance depends on his credibility; if the crime with which he is charged is somehow related to his profession, the damage cause to him cannot be redressed like damages that are essentially monetary in nature. It therefore petitioned the Court to order the State to redress the moral damage caused to Mr. Herrera Ulloa "by his prosecution, conviction, and listing in the Judiciary's Record of Convicted Felons";

g) as one form of restitution and reparation, the Court was asked to order the State to:

g(1) vacate the November 12, 1999 conviction delivered by the Criminal Court of the First Judicial Circuit of San José, and the judgments that upheld that verdict, "as well as all their subsequent practical and juridical effects that are detrimental to Mssrs. Mauricio Herrera Ulloa and Fernán Vargas Rohrmoser", among them the February 21, 2000 order to Mr. Fernán Vargas Rohrmoser; the listing of Mr. Mauricio Herrera Ulloa's name in the Judiciary's Record of Convicted Felons; and the order to take down the link at the "La Nación Digital" website between the surname Przedborski and the articles about which the criminal complaint was filed, and to create a link between those articles and the operative part of the judgment;

g(2) undertake legislative amendment of those articles of the Costa Rican Penal code that refer to crimes against honor, to make those articles conform to international standards on the subject. In other words, that Costa Rica be required to adopt the measures necessary so that under the Costa Rican legal system the exercise of the right to freedom of expression is not unduly restricted by means of its laws on the crimes of calumny and insult in cases involving publications about public figures or issues of public interest; create a full and independent system of courts of second instance for crimes of this type;

g(3) issue a public apology for the human rights violations it has committed;

g(4) publish the judgment delivered by the Inter-American Court in the instant case; and

h) once the position of the alleged victims' representatives was heard, the Court was asked to order the Costa Rican State to pay the costs incurred by the victims and their representatives in processing the legal cases in the domestic courts and those incurred when the case was brought to the Commission and then to the Court.

Pleadings of the alleged victims' representatives

189. The alleged victims' representatives argued the following with regard to reparations, costs and expenses:

a) as one measure of restitution, the November 12, 1999 conviction and all the judgments that upheld it and the court orders to enforce them should be declared void and of no legal effect;

b) the foregoing implies that the following shall be rendered without effect: 1) the criminal conviction of Mauricio Herrera Ulloa; 2) the order to publish the "Now, Therefore" portion of the November 12, 1999 verdict in the newspaper "La Nación" in the same print face in which the articles about which the criminal complaint was filed appeared; 3) the order to take down the link at the "La Nación Digital" website on the Internet between the surname Przedborski and the

articles about which the criminal complaint was brought, and to create a link between those articles and the operative part of the November 12, 1999 judgment of conviction; 4) the accessory penalty ordered against the property of the defendant for civil liability; and 5) the order to pay costs;

c) both the civil liability resulting from the crime and the order to pay costs are penalties associated with the criminal conviction and accessorial to it; therefore, if the attribution of the crime of which Mr. Mauricio Herrera Ulloa was convicted is a violation of his human rights and therefore illegitimate, so, too, are the direct consequences of the criminal conviction;

d) the effects of the civil damages ordered should disappear erga omnes, i.e., with respect to those convicted and with respect to any persons who, as alleged creditors, might make a direct or indirect claim on the civil award;

e) the listing for Mr. Mauricio Herrera Ulloa's name in the Judiciary's Record of Convicted Felons should be definitively removed;

f) with regard to Costa Rican domestic law, the representatives asked the Court to order the State to adopt the reforms needed to ensure that the provisions of the Penal Code that concern crimes against honor are compatible with the Convention, taking care to guarantee that: i) the Costa Rican legal system does not unduly restrict the right to freedom of expression through laws criminalizing defamation, calumny and insult in cases involving articles about public officials or on issues of public interest; ii) penalties for "publication of offenses," criminalized in Article 152 of the Penal Code, are to be eliminated, especially when the publication is about public officials or persons who voluntarily expose themselves to public scrutiny; and iii) the "test of truth" or exceptio veritatis is made to conform to the normal rules for distribution of the burden of proof and that in public interest cases such as the instant case, it be the alleged aggrieved party who must prove the alleged offending party's mens rea;

g) they petitioned the Court to order the State to adopt the reforms needed so that domestic law comports with the Convention on the matter of judicial guarantees, especially the guarantee of a "full and effective" remedy against a criminal conviction delivered by a court of first instance, and to ensure that that the possibilities of judicial remedy be developed beyond the extraordinary remedy of cassation, with all the limitations inherent therein;

h) as one measure of satisfaction, the alleged victims' representatives asked the Court to order the State to publicly acknowledge the human rights violations it had committed, to "offer adequate means of satisfaction to Mr. Mauricio Herrera Ulloa" and to publish the judgment delivered by the Inter-American Court;

i) given the "imminence of the impending enforcement of the civil damages ordered in the November 12, 1999 judgment, should that happen the State should compensate those whom that ruling found to be jointly and severally liable, namely Mssrs. Mauricio Herrera Ulloa and Fernán Vargas Rohrmoser, as well as the newspaper "La Nación", in the amount of sixty million colones –which sum should be adjusted to the actual value of the currency at the time the payment is made- plus the corresponding interest. The same compensation should be paid as repayment in the event of enforcement of award for personal damages and court costs ordered in the amount of three million eight hundred ten thousand colones and one million colones, respectively;

j) moral damage has been sustained in the form of the impact that the human rights violation has had on Mr. Mauricio Herrera Ulloa's practice of journalism and the personal effects that he suffered as a result of the November 12, 1999 conviction, especially given his profession, where "the journalist's credibility and personal image are paramount";

k) the representatives petitioned the Court to order the State to make compensation for the moral damage caused to Mr. Herrera Ulloa "by his prosecution, conviction, and his listing in the Judiciary's Record of Convicted Felons"; and
l) under expenses incurred, they petitioned the Court to order the sum of US$ 17,849.90 (seventeen thousand eight hundred forty-nine dollars and ninety cents), which covers transportation, lodging, telephone and meals during the representatives' trips to Washington, D.C. and San José; they also informed the Court that they were not filing a claim for attorneys' fees.

Pleadings of the State

190. With regard to reparations, expenses and costs, the State petitioned the Court to declare the application filed by the Commission and the written brief of pleadings, motions and evidence filed by the alleged victims' representatives to be unfounded and inadmissible, and pointed out that:

a) the requested nullification of the effects of the judgment, which would render the accessory penalties ineffective, is improper and inadmissible;
b) it is equally inadmissible to nullify all the civil damages awarded against the newspaper "La Nación", which is the only party found liable on some civil and cybernetic issues, while on others it was declared jointly and severally liable with Mr. Herrera Ulloa;
c) despite any harm that the listing of Mr. Mauricio Herrera Ulloa in the Judiciary's Record of Convicted Felons may have caused to his personal and "spiritual" condition, he won academic recognitions, studied in Germany and Spain, won national journalism awards, and did not have to file any request with any public institution that, by law, had access to the information contained in the Judiciary's Record of Convicted Felons because he was outside the country. Therefore, if there was any harm done to Mr. Mauricio Herrera Ulloa's honor or prestige, it had to have been confined to the period during which he was listed in the Judiciary's Record of Convicted Felons, i.e. from March 1 to April 26, 2001; that would be the one, brief period for which any possible moral damage might be claimed;
d) the only satisfaction that Mr. Fernán Vargas Rohrmoser could receive would be in his personal capacity, because it is as an individual that he can legitimately claim the protection of the inter-American system for the protection of human rights; therefore, the titles or representations he boasts "count for nothing, […] it would be an absurdity to award satisfaction to an individual […] who has not participated through the channels permitted by the inter-American system for the protection [of human rights]"; and
e) with regard to the pecuniary claims, Mr. Fernán Vargas Rohrmoser cannot be compensated for human rights violations he did not suffer, as for example a violation of freedom of expression; as then Chairman of the Board of Directors of La Nación and its senior legal counsel and representative, it would appear that Mr. Vargas Rohrmoser never wrote a "single line;" if that is the case, one can infer, then, that his right to freedom of expression and thought could hardly have been violated or denied.

Considerations of the Court

191. As recounted in the preceding chapters, the Court has found that by the events in this case, the State violated articles 13 and 8(1) of the American Convention, in relation to articles 1(1) and 2 thereof, to the detriment of Mr. Mauricio Herrera Ulloa. In its case law, this Court has established that it is a principle of international law that any violation of an international obligation that has caused damage creates a new obligation, which is to adequately redress the wrong done. [FN124] Here, the Court stands on Article 63(1) of the American Convention, which holds that

[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

[FN124] Cf. Case of Maritza Urrutia, supra note 7, para. 141; Case of Myrna Mack-Chang, supra note 7, para. 234; and Case of Bulacio, supra note 7, para. 70.

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192. Reparation of the wrong caused by the violation of an international obligation requires, whenever possible, full restitution (restitutio in integrum), which is to restore the situation as it was prior to the violation.

193. The obligation to repair, which is regulated in all its aspects (scope, nature, modes and establishment of beneficiaries) by international law, cannot be modified by the State nor can the latter avoid complying with it by invoking provisions of its domestic law. [FN125]

[FN125] Cf. Case of Maritza Urrutia, supra note 7, para. 143; Case of Myrna Mack-Chang, supra note 7, para. 236; and Case of Bulacio, supra note 7, para. 72.

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194. As the term implies, reparations are measures intended to erase the effects of the violations committed. In this respect, the reparations established should be in relation to the violations that have previously been declared.

195. The Court has determined that the November 12, 1999 judgment delivered by the Criminal Court of the First Judicial Circuit of San José that convicted Mr. Mauricio Herrera Ulloa of a crime, had the effect of violating his right to freedom of thought and expression (supra paragraphs 130, 131, 132, 133 and 135). For that reason, the State must nullify that judgment and all the measures it ordered, including any involving third parties. The effects of the judgment are as follows: 1) Mr. Mauricio Herrera Ulloa was declared guilty on four counts of the crime of publishing offenses constituting defamation; 2) the penalty imposed on Mr. Herrera Ulloa consisted of 40 days' fine per count, at ¢2,500.00 (two thousand five hundred colones) a day, for a total of 160 days' fine. In application of the rule of concurso material (where a number of related crimes are combined to reduce the penalty that would have been required had each

separate crime carried its own weight), "the fine [wa]s reduced to be three times the maximum imposed"; in other words, the fine was reduced from 160 to 120 days, for a total of ¢300,000.00 (three hundred thousand colones); 3) in the civil award, Mr. Mauricio Herrera Ulloa and the newspaper "La Nación," represented by Mr. Fernán Vargas Rohrmoser, were held jointly and severally liable and ordered to pay ¢60,000,000.00 (sixty million colones) for the moral damages caused by the articles carried in "La Nación" on March 19, 20, and 21, 1995, and then again on December 13, 1995; 4) Mr. Mauricio Herrera Ulloa was ordered to publish the "Now, Therefore" portion of the judgment in the newspaper "La Nación", in the section called "El País," in the same print face used for the articles about which the criminal complaint was filed; 5) "La Nación" was ordered to take down the link at the La Nación Digital website on the internet, between the surname Przedborski and the articles about which the criminal complaint was filed; 6) "La Nación" was ordered to create a link at the La Nación Digital website on the internet between the articles about which the complaint was filed and the operative part of the judgment; 7) Mr. Herrera Ulloa and the newspaper "La Nación," represented by Mr. Fernán Vargas Rohrmoser, were ordered to pay court costs in the amount of ¢1,000.00 (one thousand colones) and personal damages totaling ¢3,810,000.00 (three million eight hundred ten thousand colones); and 8) Mr. Mauricio Herrera Ulloa's name was entered into the Judiciary's Record of Convicted Felons. The Court finds that the State must take all necessary judicial, administrative and any other measures to nullify and abolish any and all effects of the November 12, 1999 judgment.

196. By an order dated September 7, 2001, the Court ordered the State to adopt provisional measures on behalf of Mr. Mauricio Herrera Ulloa (supra para. 17), as follows: "a) to adopt forthwith those measures necessary to suspend the entry of Mauricio Herrera Ulloa's name in the Judiciary's Record of Convicted Felons; b) to suspend the order for "La Nación" to publish the "Now Therefore" portion of the conviction handed down by the San José First Circuit Criminal Trial Court on November 12, 1999;c) to suspend the order to create a "link" at the La Nación Digital website between the disputed articles and the operative part of that court judgment. In other words, the Court had ordered a stay of some of the effects of the November 12, 1999 ruling, and had further ordered that it should remain in place "until such time as the bodies of the inter-American system for the protection of human rights ha[d] arrived at a final decision on the case."Given what the Court set out in the preceding paragraph, it considers that the State's obligations vis-à-vis the ordered provisional measures are now replaced by the obligations ordered in the present judgment, effective as of the date of its notification.

197. The Court further considers that the State must respect and ensure the right to freedom of thought and expression, in the terms of Article 13 of the American Convention and the present judgment.

198. The Court also considers that within a reasonable period of time, the State must adapt its domestic legal system to conform to the provisions of Article 8(2)(h) of the Convention, in relation to Article 2 thereof.

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199. With regard to the claim seeking reimbursement of the payment that would be made if the civil damages, court costs and personal damages ordered in the November 12, 1999 court

judgment are enforced, the Court understands that this claim has been settled by the Court's decision regarding nullification of the effects of that judgment (supra para. 195).

200. With regard to the other claims asserted by the Commission (supra para. 188 g.3 and g.4) and by the alleged victims' representatives (supra para. 189.h), the Court deems that the present judgment constitutes per se a form of reparation. [FN126] However, the Court is persuaded that the events in the instant case caused Mr. Mauricio Herrera Ulloa suffering, because of his criminal conviction, which the Court has already held constituted a violation of the right to freedom of thought and expression. Fairness dictates that compensation must be paid for the non-pecuniary damages he sustained. [FN127] Thus, the Court finds that the State must pay Mr. Mauricio Herrera Ulloa the sum of US$ 20,000.00 (twenty thousand United States dollars) or its equivalent in Costa Rican currency, as compensation for non-pecuniary damages.

[FN126] Cf. Case of Maritza Urrutia, supra note 7, para. 166; Case of Myrna Mack-Chang, supra note 7, para. 260; and Case of Bulacio, supra note 7, para. 96.
[FN127] Cf. Case of Maritza Urrutia, supra note 7 para. 166; Case of Myrna Mack-Chang, supra note 7, para. 260; and Case of Bulacio, supra note 7, para. 96.

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201. As for the reimbursement of expenses, it is for the Court to prudently assess their scope, which must include any expenses generated by the victim's representative in litigating the case before the inter-American system for the protection of human rights. This assessment must be done on the basis of the principle of equity. [FN128]

[FN128] Cf. Case of Maritza Urrutia, supra note 7, para. 182; Case of Myrna Mack-Chang, supra note 7, para. 290; and Case of Bulacio, supra note 7, para. 150.

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202. To that end, the Court deems that the State must pay Mr. Mauricio Herrera Ulloa the sum of US$10,000.00 (ten thousand United States dollars) or the equivalent in Costa Rican currency, to defray the expenses of litigating his defense before the inter-American system for the protection of human rights.

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203. The State must fulfill its pecuniary obligations by means of a payment in United States dollars or in an equivalent amount in Costa Rican currency, using for the respective calculation the exchange rate between both currencies at the New York exchange the day before the payment.

204. The payments for non-pecuniary damages and expenses established in the present Judgment shall not be subject to any existing or future tax or levy. The State shall comply with

the measures of reparation and with the reimbursement of expenses ordered (supra paragraphs 195, 200 and 202) within six months of the date of notification of the present Judgment. The State must comply with the other reparation ordered (supra para. 198) within a reasonable period of time. Should the State fall into arrears, it shall pay interest on the amount owed, which will be the banking arrearage interest rate in effect in Costa Rica.

205. If for any reason attributable to the beneficiary of the compensation, he is unable to receive it within the stipulated six-month period, the State shall deposit the respective amount in favor of said beneficiary in an account or certificate of deposit, at a sound financial institution, in United States dollars or their equivalent in Costa Rican currency, under the most favorable financial terms allowed by banking practice and law. If after ten years the payment has not been claimed, the amount will be returned to the State, with the interest earned.

206. In keeping with its usual practice, the Court will oversee compliance with this Judgment and will declare the case closed once the State has fully complied with it. Within six months of the date of notification of this Judgment, the State shall submit a report to the Court on the measures adopted to comply with this Judgment.

XIV. OPERATIVE PARAGRAPHS

207. Now therefore,

THE COURT

unanimously

DECLARES:

1. That the State violated the right to freedom of thought and expression protected under Article 13 of the American Convention on Human Rights, in relation to Article 1(1) thereof, to the detriment of Mr. Mauricio Herrera Ulloa, as described in paragraphs 130, 131, 132, 133 and 135 of the present Judgment.
2. That the State violated the right to judicial guarantees recognized in Article 8(1) of the American Convention on Human Rights, in relation to Article 1(1) thereof, and Article 8(2)(h) of the Convention, in relation to articles 1(1) and 2 thereof, to the detriment of Mr. Mauricio Herrera Ulloa, as described in paragraphs 172, 174, 175 and 167 of the present Judgment.
3. That this Judgment constitutes per se a form of reparation, as established in its paragraph 200.

And unanimously

DECIDES THAT:

4. The State must nullify the November 12, 1999 judgment of the Criminal Court of the First Judicial Circuit of San José and all the measures it orders, as established in paragraphs 195 and 204 of the present Judgment.

5. Within a reasonable period of time, the State must adjust its domestic legal system to conform to the provisions of Article 8(2)(h) of the American Convention on Human Rights, in relation to Article 2 thereof, as established in paragraph 198 of the present Judgment.
6. The State must pay non-pecuniary damages to Mr. Mauricio Herrera Ulloa in the amount of US$ 20,000.00 (twenty thousand United States dollars) or the equivalent in Costa Rican currency, as established in paragraphs 200, 203, 204 and 205 of the present Judgment.
7. The State must pay Mr. Mauricio Herrera Ulloa the sum of US$ 10,000.00 (ten thousand United States dollars) or the equivalent in Costa Rican currency, to defray the expenses of his legal defense in litigating his case before the inter-American system for the protection of human rights, as established in paragraphs 202, 203, 204 and 205 of the present Judgment.
8. None of the compensation ordered in operative paragraphs 6 and 7 of this judgment shall be subject to any tax or levy currently in existence or ordered in the future, as established in paragraph 204 of the present Judgment.
9. Should the State fall into arrears, it shall pay interest on the amount owed, which will be the banking arrearage interest rate in effect in Costa Rica, under the terms specified in paragraphs 203 and 204 of the present Judgment.
10. The State's obligations vis-à-vis the provisional measures previously ordered by the Court are replaced by the measures ordered in the present Judgment, effective the date of its notification, in the terms set forth in paragraphs 195, 196, 198, 200 and 202 of the present Judgment.
11. The State must comply with the measures of reparation and reimbursement of expenses ordered in operative paragraphs 4, 6 and 7 of the present Judgment, within six months of the date of notification of the present Judgment.
12. Within six months of the date of notification of this Judgment, the State shall submit a report to the Court on the measures taken to comply with the present judgment, as established in paragraph 206 thereof.
13. The Court will oversee compliance with this Judgment and will close the present case once the State has fully complied with the measures ordered herein.

Judge García Ramírez informed the Court of his Concurring Opinion, which is annexed to this Judgment.

Sergio García-Ramírez
President

Alirio Abreu-Burelli
Oliver Jackman
Antônio A. Cançado Trindade
Cecilia Medina-Quiroga
Diego García-Sayán

Marco Antonio Mata-Coto
Judge ad hoc

Pablo Saavedra-Alessandri
Secretary

So ordered,

Sergio García-Ramírez
President

Pablo Saavedra-Alessandri
Secretary

CONCURRING OPINION OF JUDGE SERGIO GARCIA RAMIREZ IN THE JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS IN THE CASE OF HERERERA ULLOA VS. COSTA RICA, OF JULY 2, 2004

1. Freedom of expression, the media and the practice of journalism

1. This is not the first time that the Inter-American Court has had to adjudicate matters constituting violations of freedom of expression. The Court has examined cases in which such violations were alleged, but the backdrop against which those violations occurred has varied. It might be one of gross human rights violations, a weakening of democracy and institutional conflict. Then again, the context might also be one in which democracy flourishes and fundamental rights are, on the whole, observed. The latter scenario is the one that best fits the case of Herrera Ulloa vs. Costa Rica, which the Court decided in its Judgment of July 2, 2004. I concur with the Court's judgment in the case and am attaching the present Opinion thereto. The differing backdrops point up an important issue, although not the one I am addressing here: the features that attend the clash between legally protected interests and the preservation of human rights in an "authoritarian environment" as opposed to those that attend such a clash in a "democratic environment."

2. When on those previous occasions the Court examined violations of Article 13 of the American Convention on Human Rights, it took into account, as it does in the present judgment to which this Concurring Opinion is affixed, the specific characteristics of freedom of expression when exercised through the mass media. The mass media carry messages to a large audience and therefore have a social impact that the Court has also identified with Article 13 of the American Convention. In a democratic society, the mass media provide information to society as a whole and thus serve to inform the decisions that its members make, with all the consequent implications.

3. Obviously, freedom of expression is upheld and defended, no matter the circumstance. There are no subjective boundaries. Freedom of expression is not confined to any particular human group defined by socioeconomic status, ethnicity, nationality, gender, age, conviction or belief. It is truly universal in that it is a freedom that all people enjoy. However, when that freedom is exercised as a profession, it does have some significant distinctive features that require qualifications, precautions, and specific conditions. Professional journalists cultivate an attitude that takes freedom of expression as a given. They use freedom of expression as a tool for their personal realization and as a means to enable others to develop their human and collective potential. Thus, specific declarations or instruments concerning freedom of expression are

premised on its universality and from there go to the particular nature of freedom of expression in the context of the mass media. One finds this, too, at the domestic level, where the effort is made –as it has been in Costa Rica-- to have laws that pertain to the mass media and not just freedom of expression in general.

4. The "transcendental quality" of freedom of expression manifests itself in journalism. The distinctive features of freedom of expression exercised through the mass media include its sweeping scope (which enables it to reach many people, most of them well-removed from the source of the message and unknown to it), and the condition of those who practice journalism as a profession (communications professionals upon whom the recipients of the message to a large extent rely for their information.). The implication here is that freedom of expression has two aspects: on the one hand, it is a fundamental right, connected to the other basic rights and plays a role in social life as a whole. But freedom of expression can also be viewed from a "functional" perspective, having to do with the service that it provides and that enables the existence, survival, exercise, development and guarantee of other rights and freedoms.

5. Other rights suffer, weaken or disappear when freedom of expression is eroded. The protection of life and liberty, preservation of integrity of person, respect for property, and access to the courts: all these owe much to freedom of expression manifesting itself as criticism or a power to denounce, which is an individual and collective imperative. Authoritarianism tends to wield its power against freedom of expression as a means to forestall revelation of the truth, to silence differences, to dissuade or frustrate voices of protest and, in the end, to negate the pluralism that is one of the distinctive features of a democratic society. Hence, society's "democratic senses" must be constantly alert so as to prevent and combat any violation of freedom of expression which might bring with it, sooner or later, other forms of oppression.

2. Limitation of and restrictions on the enjoyment and exercise of freedom of expression.

6. Although the instant case did not occur against a backdrop of authoritarianism, it does bring to mind issues that are both relevant to and important for freedom of expression and, by extension, its institutions and practices in a democratic society. It also draws attention to some of the issues that are at the heart of the contemporary debate. One of these is how to resolve the conflict between legally protected interests and rights, on the one hand, and what constitutes a legitimate reaction to what happens when boundaries are crossed and the exercise of one encroaches upon the other. Of course, this is hardly unexplored territory. Indeed, these topics have been under constant study. The highest national courts and international courts have heard cases involving the exercise of freedom of expression as opposed to other rights and freedoms equally deserving of recognition and protection. The deliberations on the questions raised here have not always resulted in unanimous conclusions. There are, in this area, unfinished deliberations and settlements pending.

7. The judgment adopted by the Court, with which I am in agreement, takes into account, on the one hand, the duality of freedom of expression to which I alluded earlier; but it also considers the limits on the exercise of freedom of expression. The proclamation of the basic rights of man as statute marked the advent of modern man: no longer vassal, but a citizen and titulaire by the mere fact that he is a human being. But the proclamation of the basic rights of man occurred in

conjunction with another resounding declaration embodied in the very same documents: that an individual's rights stop where another's begin. One is titulaire of rights and exercises them, on condition that the titularite and exercise of those rights do not deny other fellow citizens of the titularite and exercise of their own rights. This boundary, announced in the classic declarations and preserved in modern-day instruments, is expressed in various concepts: the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy, to use, by way of example, the language of the American Declaration of the Rights and Duties of Man (Article XXVII) and echoed in the Pact of San José (Article 32(1)).

8. From this dialectic, which is a constant in social relations and an ever-present issue before the courts, comes the limitation or restriction on the enjoyment and exercise of rights and freedoms. These restrictions "may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established" (Article 30 of the American Convention). The rules for interpreting treaties, with the special importance they have in the case of human rights, strive for maximum and optimum respect for and enforcement of rights and freedoms, in keeping with the object and purpose of the corresponding treaty. Hence, limitations must be understood and applied by a narrow criterion and by the strictest standards of reasonableness, opportunity and moderation. This point, too, is explored in international case law and echoed in the decisions of the Inter-American Court.

9. Apart from the regime of generic limitations that pertain to various rights and freedoms, the Convention adds specific limitations in the area of freedom of thought and expression, as is evident in Article 13, paragraphs 2, 4 and 5. The Court has put together a careful formula concerning the admissible restrictions in this case, which can be used as a rule of thumb when assessing the restrictions that domestic legal systems establish. In Advisory Opinion OC-5/85, on Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), of November 13, 1985, this Court pointed that the "necessity and, hence, the legality of restrictions imposed under Article 13(2) on freedom of expression, depend upon a showing that the restrictions are required by a compelling governmental interest. Hence if there are various options to achieve this objective, that which least restricts the right protected must be selected. Given this standard, it is not enough to demonstrate, for example, that a law performs a useful or desirable purpose; to be compatible with the Convention, the restrictions must be justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of the right Article 13 guarantees. Implicit in this standard, furthermore, is the notion that the restriction, even if justified by compelling governmental interests, must be so framed as not to limit the right protected by Article 13 more than is necessary. That is, the restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it." (para. 46)

3. The criminal law reaction

10. And so, one accepts the possibility and even the necessity of reacting in ways that keep everyone's rights and freedoms intact and that therefore punish those who cross boundaries and in so doing violate the rights and freedoms of others. This is the bedrock of the system of

responsibilities, in its various aspects, with the corresponding list of sanctions. By selecting the lawful options wisely, a balance is struck that discourages anarchy and authoritarianism.

11. Not infrequently the freedom of expression protected under Article 13 of the American Convention comes in conflict with, or seems to come in conflict with, other rights, such as the rights to privacy, honor, dignity, and to the presumption of innocence. Article 11 of the Convention alludes to the right to have one's honor respected and one's dignity recognized.The potential is there for a collision of protected rights, a collision that has particular connotations when it is freedom of expression exercised through the mass media, with the enormous impact they (the media) have, the power they represent and the effect that they can have, for that very reason, on the lives of persons, their integrity and the preservation of their legally protected interests. When such a collision cannot be averted, an authority must intervene to correct the inequity, demand accountability and impose the measures that follow from the responsibility incurred. This is where the "necessity" comes into play. Identifying the interests that need to be protected, weighing their importance in the democratic scheme of things and selecting the proper means to protect them are not always a simple matter.

12. In the case brought to the Inter-American Court's attention, resulting from the publication of certain articles in "La Nación" newspaper in Costa Rica, written by journalist Mauricio Herrera Ulloa, it was argued that criminal sanctions had to be considered as a means to punish what was alleged to be unlawful conduct in the practice of journalism, conduct that, it was claimed, caused harm to private persons. From the beginning, this position necessitates an examination of the crimes alleged and how they were interpreted in trial. This examination raises the problem of malice in general, and the specific malice that must be present when crimes against honor are involved. It also raises the matter of the exceptio veritatis as a possible grounds for preclusion of punishment –either because the conduct did not fit the crime, or because of justification or lack of culpability, depending on how that possibility is dealt with in the positive law systems and the position that the doctrine takes on the subject. Then, too, all this raises questions concerning the so-called presumption of innocence, or to be more rigorous, the principle of innocence that governs and tempers the treatment of the accused under criminal law and procedural law.

13. Seen from this perspective, the following must be said: a) that in order to be classified as a punishable offense for the improper exercise of freedom of expression, the following must be present: specific malice to discredit a person's reputation, to damage his good name or prestige, to cause harm to the passive subject, and to not to confine oneself to predicting and suggesting a certain outcome; b) in democratic systems, criminal law rightly lays the burden of proof on the party making the accusation, not the party who, as the accused, denies the charge based on the principle of presumption of innocence; c) that if the principle of exceptio veritatis is statute, then it ought not to reverse the burden of proof which would confound the evidentiary consequences of that principle; and d) that the practice of the journalism profession involves rights and duties vis-à-vis information –among them certain obligations of prudence and care, as is true of any profession. The practice of journalism is provided for and protected by the law, inasmuch as journalism is a social interest that the State protects; there may, therefore, be a premise for preclusion of crime on the grounds that the conduct is permissible if it meets the conditions set forth in the law regulating this preclusion, conditions similar or identical to those required in the

case of other grounds for justification. Of course, the boundaries of the duty to be cautious must be established thoughtfully. The fact that the duty exists does not mean that the obligatory caution needs to exceed the boundaries of what is reasonable. Otherwise, journalists would feel overly inhibited and silence would take the place of the free flow of ideas.

14. Before settling on how best to classify these behaviors as criminal offenses, one first has to decide whether the criminal law avenue is the one best suited to getting at the crux of the problem –in a manner consistent with the conflicting rights and interests and with the implications of the alternatives available to the lawmaker- or whether some other avenue, such as administrative or civil law, for example, might be the better juridical response. Indeed most infractions are not addressed as matters of criminal law or through criminal courts, but through measures of other kinds.

15. At this point in the analysis, it is worth recalling that as a rule, save for some digressions into authoritarianism -all too many and unfortunately not yet on the decline, the current thinking favors the so-called minimalist approach to criminal law. In other words, moderate, restricted, marginal use of the criminal-law apparatus, reserving it instead for only those cases when less extreme solutions are either out of the question or frankly inadequate. The power to punish is the most awesome weapon that the State –and society, for that matter- has in its arsenal, deploying its monopoly over the use of force to thwart behaviors that seriously –very seriously- threaten the life of the community and the fundamental rights of its members.

16. In an authoritarian political milieu, the criminal law solution is used frequently: it is not the last resort; it is one of the first, based on the tendency to "govern with the penal code in the hand," a proclivity fostered by blatant and concealed authoritarianism and by ignorance, that can think of no better way to address society's legitimate demand for security. The opposite happens in a "democratic environment": criminalization of behaviors and the use of sanctions are a last resort, turned to only when all others have been exhausted or have proven to be inadequate to punish the most serious violations of important legal interests. Then, and only then, does a democracy resort to punitive measures: because it is indispensable and unavoidable. Even so, classifying behaviors as criminal offenses must be done carefully and by rigorous standards, and the punishment must always be tailored to the importance of the protected interests, the harm done to them or the peril to which they are exposed, and the culpability of the perpetrator. The lawmaker has a number of useful options available to choose from, as does the judge. Of course, a distinction has to be made between the "real need" to use the criminal law system, which must have a clear, objective basis, and the "false need" to do so because the authorities have been ineffective in doing their job and then pretend "to correct" the problem by unleashing the repressive machinery.

17. Reserving the criminal law forum for as few cases as possible must not be interpreted to mean that illegal conduct is justified or that impunity is authorized, allowing the offense to go unanswered. Were the State to do so, it would be remiss in its obligations vis-à-vis the victim. It simply means redirecting the juridical response into a forum where the offenses can be adjudged reasonably and the perpetrators punished appropriately. This alternative allows the State to address, in an appropriate manner and at less social cost, the need to preserve cherished but apparently conflicting interests, without resorting to unnecessary and by extension excessive

punishments, while also ensuring that those who engage in unlawful behavior will receive the condemnation they deserve. In short, decriminalization does not mean license or impunity.

18. This way of dealing with unlawful conduct seems particularly appropriate in the case of (some or all) offenses against honor, good name and the prestige of private persons. The civil law court can be used to achieve the same results that one might hope to get through the criminal court, without the risks and disadvantages that the latter poses. In fact, a conviction in civil court is in itself a statement that the conduct in question was unlawful, a statement no less emphatic and effective than a conviction in criminal court. Although the forum may be different in name, it can arrive at the same finding that a criminal law court would: i.e., that the respondent's behavior constituted wrongful conduct detrimental to the plaintiff, who has the law and reason on his side. Thus, the civil verdict itself becomes a form of reparation that serves to redeem the honor and good name of the person seeking the court's protection. In a number of its judgments, including the judgment in the Case of Herrera Ulloa vs. Costa Rica, the Inter-American Court underscored the importance of the judgment itself as a means of reparation or moral satisfaction. Furthermore, a civil judgment can order payment of moral damages and, where appropriate, pecuniary damages to redress the harm caused to the person who was defamed. So a civil judgment provides two types of reparation that are of greater interest to an aggrieved party and social satisfaction in the form of the court's censure of the unlawful conduct.

19. And so, this solution should be –and in fact has been- given serious consideration, de lege ferenda, as a substitute for the options under criminal law when a journalist is on trial for offenses against honor in the practice of his profession. Naturally, bases of justification, under civil and criminal law, resulting from the exercise of a right or the performance of a duty in accordance with the standards of journalism would remain intact. When such justification is present, there can be no liability. Obviously, the civil solution does not pose the same problems that the criminal law solution poses vis-à-vis domestic and international human rights standards, nor does the civil law solution have the intimidating effect that the criminal law solution has. As the Court has pointed out, the criminal law solution can ultimately inhibit the exercise of freedom of expression.

20. In seeking alternative solutions, which should ideally yield "the" reasonable solution to this matter, it is worth recalling that in some cases, provision has been made to punish, as criminal offenses, the repeated commission of illicit acts initially punishable under civil or administrative law. In such cases, the repetition of the offense implies aggravation of the wrongdoing, to the point that it moves from the realm of civil or administrative law into the realm of criminal law and is punishable with measures provided for under criminal law. There may have been other less drastic options to find a solution, which many of us would consider preferable: to resolve in the civil courts the excesses committed through the mass media, by professionals in the information business. This proposal does not necessarily mean either the exclusion or the inclusion of all possible offenses against honor. Several legal systems have opted to remove this from the realm of criminal law, to allow it to be solved by civil and administrative means.

21. When the Court heard this case, it learned about a bill in Costa Rica on the subject of freedom of expression and freedom of the press, which would introduce changes into the Penal

Code and the Code of Criminal Procedure and in the Press Act. This bill points up the existence of a school of thought that believes that certain provisions closely related to the subject of freedom of expression need to be amended. Under the bill, which the Court is not called upon to address in the case sub judice, certain grounds for preclusion of the crime related to behaviors of the kind that the present case involves would be added to Article 151 of the Penal Code.These include situations such as "publication or reproduction of information or value judgments on matters of public interest that offend honor or public reputation, that have been aired by other mass media, by news agencies, public authorities or private persons with authoritative knowledge of the facts, provided the publication always indicates the source being cited" (paragraph 2); or the situation when an "unfavorable opinion is expressed in discharging a duty or exercising a right, provided that the modus operandi or the lack of discretion, when discretion was in order, do not establish the presence of an intent to offend" (paragraph 4).

4. Protection of honor. Public interest and status as a public official

22. Given the particulars of the instant case, the Court's judgment has addressed some aspects of the conflict between freedom of expression, exercised in journalism for purposes of reporting, and the right to a good name, to dignity, honor, privacy of the person alluded to in the press report. In the instant case, a distinction has been drawn between the situation of a public official and that of the ordinary citizen who is not performing any function by mandate of or on behalf of the State.

23. Among the central purposes of the information required by citizens and provided by the mass media is one that concerns "res populi", understood in a broad, contemporary and "realist" sense to mean that "everyone can know that which of interest to everyone." There is a legitimate interest in knowing what is of interest to society as a whole, what impacts the functioning of the State, what affects general interests or rights, and what has important consequences for the community: all that engenders a legitimate use of freedom of expression for informative purposes. The business of government –and more broadly the activities of the State through its various organs- are not inconsequential to the everyday citizen and knowledge of the business of government should not be beyond the reach of that everyday citizen. Democracy is built upon a duly informed public, which steers its way of thinking and makes its decisions on the basis of that information. Information about the business of government should be much more readily available than strictly private information about an individual's personal or private life that does not cross over those strict boundaries. Indeed, the business of government is one of the natural domains for so-called "transparency."

24. In today's complex, heterogeneous, developed society, which operates under the influence of a variety of social, political and economic agents, that public "zone of interest" is not confined to what might be formally classified as "state," "governmental," or "official." It extends far beyond that, as far as the public interest demands. The situation and decisions of private persons are not affected just by the formal acts of the State: other agents can exert a powerful and even decisive influence on the lives of private individuals. We cannot disregard another sensitive and important aspect here: the distortions that the information can contain and the abuses of power –formal and informal- that can be concealed through the dissemination of news and the expression of thought.

25. It has never been asserted that public officials, because they are public officials, lose the right that all persons have to protection of their honor, good name, reputation, personal and private life. However, the life of a public official –understood in the broad sense- does not have the clear boundaries, if any boundaries at all, that a private citizen has in his life. In the case of a public official it will not always be easy to distinguish between private acts and public acts; or between personal acts that are of no public importance, relevance or interest, and the personal acts that are of public importance, relevance or interest. The difficulty in establishing the boundary does not mean that a strictly private zone does not exist, one that is legitimately removed from public scrutiny.

26. When analyzing this point, which has been examined and debated time and time again, one cannot ignore the fact that a public official can use the authority or influence he has, precisely by virtue of his position, to serve private interests, his own or those of third parties. Where this kind of accommodation of private interests exists, it ought not to be beyond the realm of collective democratic scrutiny. Otherwise, it would be an easy matter to erect artificial borders between "public and private" matters, as a means of removing private acts or situations that rely on the individual's position as a public official from that democratic scrutiny.The "umbrella of protection" of someone who has agreed to serve the republic, in the broad sense, is lower than someone who has not (just as it is lower in the case of those who have sought to put themselves in the public eye and thus permitted broad public access). Again I must emphasize: the umbrella is there, of course; however, it is different from the one that protects the citizen who has not taken on the position and the responsibility of someone in public office who, for that very reason, has certain obligations –ethical and legal- vis-à-vis the society he serves or the State that manages society's interests.

27. To put it another way, the republic heeds –as well it should- the manner in which its public officials represent it, serve its interests, perform the functions inherent in the office conferred, and exercise their authority, the influence or the advantages that that representation or those offices represent. The trust that society invests –directly or through the appointments that certain organs of the State make- is not a "blank check". It rests upon and is renewed upon a rendering of accounts. That rendering of accounts is not given in some solemn, periodic ceremony; it is given in service, through reports, explanations, vouchers. Obviously, the exercise of that public scrutiny through the information made available to the public is not without its responsibilities: in today's world, no one is legibus solutus. Democracy does not mean transferring abusive exercise of power from someone's hands to someone else's, who would be free to do whatever he wanted. However, I already addressed the issue of accountability and the way to exact it.

5. Recourse to a higher judge or court

28. The Judgment in the Case of Herrera Ulloa vs. Costa Rica raises other issues that I would like to examine in this Opinion. One is the remedy attempted to challenge the court ruling that went against the victim. As to the minimum guarantees to which the accused shall have a right, the American Convention provides that every person accused of a criminal offense shall have "the right to appeal the judgment to a higher court" (Article 8(2)(h)). This is one of the

ingredients of due process, which the Court recognizes as applying to trials of all types, not just criminal trials. In my view, this "right to appeal" may also apply to the system of judicial protection provided for in Article 25 of the Convention, if it is understood that the recourse or remedy to which Article 25 refers, which has an essence of its own that distinguishes it from the proceeding to which Article 8 refers, must also conform to the system of due process of law, with everything that implies.

29. The dual instance system is well known, although the second instance is perhaps more common in some places than in others. The purpose of that second instance is to re-examine the material heard in first instance and to confirm, modify or vacate the lower-court decision on the basis of that re-examination of the facts. Review of the final judgment, i.e., the one delivered by the court of second instance, is also a possibility; in some cases there is a legal time frame in which review may be requested, in some cases not; the request for review is in the form of a challenge to review the judgment to test whether it was delivered in accordance with the law that was to be applied, the case being error in judicando and error in procedendo. In criminal law, there is another possibility, which is the extraordinary appeal, which authorizes, in a limited number of circumstances, reconsideration and eventual nullification of a conviction and sentence currently being served: proof that the person that the convicted person is said to have murdered is still alive; a finding that the public document that was the sole evidence upon which the conviction was based was false; conviction of two persons, in separate cases, when it was impossible that both committed the crime, and so on. Obviously, this exceptional remedy is not one of the ordinary remedies for challenging a definitive criminal conviction. Neither is the remedy by which one challenges the constitutionality of a law.

30. Here, we ought to ask ourselves what can be required of the appeal mentioned in Article 8(2)(h), from the standpoint of the mamimum protection of the individual's rights and, therefore, in keeping with the principle of presumption of innocence to which the accused is entitled until a final judgment is handed down, and of the right to formal and material access to justice, which demands issuance of a "just" verdict (even if it is for conviction, although with a punitive content different from what the appropriate one seemed to be at first glance). Is this a limited review that could disregard factors that were truly relevant to determine the accused' criminal responsibility? Ought we to content ourselves with a limited review, that examines only cerrtain aspects of the conviction, but must relegate others into some dark territory that cannot be entered, even though one might find there the motives and reasons that could prove the accused' innocence?

31. The answer is obvious from the way in which the question is posed. The goal here is to protect the human rights of the individual, one of which is not to be convicted unless and until the commission of an offense punishable under criminal law has been proved and the accused' guilt under the law has been proved. It is not merely a question of preserving the integrity of the process or the verdict. Therefore, recourse to a higher court or judge –which would have to outrank, in the area of competence and jurisdiction, the court whose decision is being challenged- must allow that higher court or judge to get into the merits of the case, examine the facts alleged, the defense's counter-arguments, the evidence taken, the weighing of that evidence, the laws invoked and their application, even for such matters as identifying the punishment or measure (which includes the pertinent substitution), and whether that punishment is just given the severity of the crime, the legally protected interest affected, the culpability of the

agent and other facts that go into determining what the punishment should be (extenuating or aggravating circumstances or other information that steers the court to a reasoned conclusion).

32. Obviously, those needs are not met with a narrow, "phantom" remedy, much less when the system offers no remedy at all, which some legal systems do not in the case of crimes regarded to be of much less importance and in regard to which court proceedings are very abbreviated.Affording the accused all the benefits of a substantive defense is the best way to ensure a just outcome, rather than rely on technicalities, which are hardly the best way to achieve justice. Therefore, to fully satisfy these needs, the system for appealing grievances to a higher court has to be adopted and expanded. The errors and shortcomings of an incompetent defense would be sorted out by the court, and justice will have been well served.

33. In the judgment delivered in the Case of Castillo-Petruzzi, one Judge of the Court produced a Concurring Opinion in which he alluded to this matter (and others), although he did so in reference to a military court system that had failed to respect the right of appeal: "that the victim's right to a court of second instance was not respected (because the courts that heard the case on review) did not function as tribunals that re-examine all the facts in a case, weigh the probative value of the evidence, compile any additional evidence necessary, produce, once again, a juridical assessment of the facts in question based on domestic laws and give the legal grounds for that assessment." (Concurring opinion of Judge Carlos Vicente de Roux Rengifo, in the Judgment on the Case of Castillo-Petruzzi et al., May 30, 1999).

34. In the instant case, the remedy of cassation was used, as it is the only one that the Costa Rican procedural system provides, since the remedy of appeal –which is what the court of second instance is for- was done away with. The Court is not unmindful of the important role that the petition of cassation has had in its long history, or of how effective it has been and is to this day. However, as a rule, it is a complicated challenge procedure and not always available as a remedy for everything that is justiciable. The Court has considered the universe of issues that, under positive law, are covered by a cassation system and therefore subject to the material jurisdiction of the higher court. In the instant case, cassation does not have the scope that I described in paragraph 30 above and to which the Judgment of the Court referred to confirm the scope of Article 8(2)(h) of the American Convention. It is possible that elsewhere, where the petition seeking a writ of cassation has developed differently, it may well cover points that an appeal would ordinarily address, as well as a review of legality which is the essential function of cassation.

35. I am, of course, aware that this raises important problems. There is a strong and respected trend, embodied, for example in the excellent Model Code of Criminal Procedure for Ibero-America put together by a select group of jurists, that favors doing away with the traditional two-tiered system, leaving review of judgments solely in the hands of the court of cassation. This position argues, inter alia, that two-tiered systems –a lower court and an appellate court- are costly and that the principle of procedural immediacy has to be preserved. Appellate courts do not always observe that principle, as we customarily understand it. To retain the advantages of the two-tiered system where a case is heard first by one judge and then by a collegiate body whose members collectively represent an added guarantee of a just outcome, the option that

would do away with the two-tiered system would have a collegiate bench for the one court that hears the case before it goes to the court of cassation.

6. Tax exemptions

36. The Judgment in the Case of Herrera-Ulloa raises two other questions that I would like to briefly touch upon, although they have no bearing at all on those previously discussed. One has to do with the practice of ordering that none of the pecuniary reparations, expenses and costs ordered may be subject to any existing tax or any tax legislated into law at any time in the future. I understand and agree with the material sense of that order, and have therefore voted in favor of this clause: the idea, of course, is not to allow tax laws to eat into the reparations ordered, and thus defeat the purpose of pecuniary damages and leave the victim's rights unprotected.

37. However, on previous occasions I have observed –and do so again in this opinion– that the very same end can be achieved through less controversial means. The solution that the Court customarily uses in its orders presupposes an alteration to the State's tax system: a tax exemption that may be complicated and impractical. The same end can be achieved by some other means. One alternative would be to order that the agreed upon sums shall be "liquid" or "net" of taxes. So long as the amount ordered by the Court is covered, the State could make allowance for taxes owed by using a subsidy or by adding something to the amount ordered by the Court so that, once the deductions for taxes required under tax law have been made, the amount owed and paid is precisely the amount that the Court ordered in its Judgment.

7. Expenses and fees of legal counsel

38. This case is the first time that the Court has ruled that the amounts owed to third parties in the form of expenses and fees for those who provided the victim's legal counsel, would be handed over directly to the victim, so that the victim –and not the Court- would apportion that sum as he saw fit and with that satisfy any obligations that he may have incurred or as equity dictates. It was with the Judgment on Reparations in the Case of Garrido and Baigorria, of August 27, 1998, that the Court established certain criteria regarding the amounts owed to those who provide that assistance, which is unquestionably of the utmost importance. The function of providing international protection of human rights would be a difficult one without the efficient services so frequently rendered by professionals who are the advocates, both domestically and internationally, of the victim's rights. They are an important –and sometimes even decisive- ingredient in the activities aimed at enabling access to justice.

39. To assess costs and expenses in the present judgment, one of which is for the legal counsel to which I alluded in the preceding paragraph, the Inter-American Court deemed it appropriate to take into account not only the receipts and vouchers provided –which in many cases is virtually impossible to do in the manner that rigorous accounting practices require- but also the particular circumstances of the case, the characteristics of the respective proceedings and the nature of the jurisdiction for the protection of human rights, which is so very different from what one would find, for example, in the case of strictly financial matters. When the time came to set costs and expenses, therefore, the Court dismissed the idea of setting attorney's fees as a percentage of the compensation obtained and held that there were other factors to consider, such

as “the evidence introduced to demonstrate the facts alleged, full knowledge of international jurisprudence and, in general, everything that would demonstrate the quality and relevance of the work performed.” (par. 83).

40. The Inter-American Court’s finding was that while it must recognize the victim’s need to acknowledge the assistance he has received and the expenses that have been incurred to provide that assistance, it is not the function of the Court to assess the performance of the legal advisors and to order that payment be made to them directly. This has to be decided by the person who retained their services and who was at all times abreast of their work and their progress. The Court did not order direct payment of fees to physicians who attended the victim, or payment of any other considerations to certain parties. It is the victim, using the sum that he receives, who can best determine what is owed or what is equitable. The contract was made between the victim and his advisors, directly and of their own free will, and the Court has no reason to intervene in the matter by setting a value on the amount owed to each. What the Court has to do –as it has in this case, invoking the principle of equity- is to provide for the considerations herein mentioned, take them into account when deciding the compensation, and let the victim make the decisions and determinations that are his.

Sergio García-Ramírez
Judge

Pablo Saavedra-Alessandri
Secretary